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April 6, 1984

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Title: Atchison, Topeka and Santa Fe Railway Company, et al., Appellants
v.
National Railroad Passenger Corporation

Court: United States Court of Appeals for the Seventh Circuit

Counsel for appellant: Platz III, George A.

Counsel for appellee: Mickey Jr., Paul F., Solicitor Genera

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Apr 6 1984 | G | Statement as to jurisdiction filed. |
| 2 | Apr 25 1984 | | Waiver of right of appellee United States to respond filec |
| 3 | Apr 26 1984 | | Waiver of right of appellee Natl. RR Passenger Corp. to respond filed. |
| 4 | May 29 1984 | | DISTRIBUTED. June 14, 1984 |
| 5 | Jun 14 1984 | P | Response requested. |
| 6 | Jul 10 1984 | | Memorandum of appellee United States filed. |
| 7 | Jul 13 1984 | | Memorandum of appellee Natl. RR Passenger Corp. filed. |
| 8 | Jul 18 1984 | | REDISTRIBUTED. September 24, 1984 |
| 9 | Oct 1 1984 | | In No. 83-1492 probable jurisdiction is noted. In No. 83-1633 further consideration of the question of jurisdiction is postponed to the hearing of the case c the merits. |
| | | | ********** |
| 10 | Nov 15 1984 | | Joint appendix filed. VIDED. |
| 11 | Nov 15 1984 | | Brief of appellee United States filed. VIDED. |
| 12 | Dec 4 1984 | | SET FOR ARGUMENT. Tuesday, January 15, 1985. This case is consolidated with No. 83-1492. (4th case) (1 hr). |
| 13 | Nov 30 1984 | G | Motion of the Solicitor General for divided argument filed. |
| 14 | Dec 10 1984 | | Motion of the Solicitor General for divided argument GRANTED. |
| 15 | Dec 10 1984 | | CIRCULATED. |
| 16 | Dec 11 1984 | | Record filed. |
| 17 | Dec 11 1984 | | Certified original record on appeal & C.A. proceedings received. |
| 18 | Dec 15 1984 | X | Brief of appellees ATS&F Rwy. Co., et al. filed. VIDED. |
| 19 | Jan 2 1985 | X | Reply brief of appellant Natl. RR Passenger Corp. filed. VIDED. |
| 20 | Jan 15 1985 | | ARGUED. |

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# JURISDICTIONAL

# STATEMENT

Office - Supreme Court, U.S.
FILED
APR 6 1984
ALEXANDER L. STEVAS,
CLERK

83-1633

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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**ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, BURLINGTON NORTHERN INC., CHESAPEAKE AND OHIO RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, and UNION PACIFIC RAILROAD COMPANY,**

*Cross-Appellants,*

v.

**NATIONAL RAILROAD PASSENGER CORPORATION,**

*Cross-Appellee.*

---

**On Cross-Appeal from the United States Court of Appeals for the Seventh Circuit**

---

## JURISDICTIONAL STATEMENT ON CROSS APPEAL

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April 6, 1984

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19 pp

## QUESTION PRESENTED ON CROSS-APPEAL

Does the "entire responsibility for the provision of intercity rail passenger service" from which the Railroads were relieved by the Rail Passenger Service Act and contracts entered into by the Railroads and Amtrak thereunder in 1971 include financial responsibility for free and reduced-rate intercity rail passenger service which Congress has required Amtrak to provide to certain Railroad employees and their dependents, thereby rendering subsequent Acts of Congress purporting to impose such a financial responsibility on the Railroads an unconstitutional impairment of the Railroads' contractual rights?

## PARTIES

In addition to the parties identified in the caption above, the United States participated in this case as an Intervenor-Defendant in the District Court and as an Intervenor-Appellee in the Court of Appeals.*

* The statement of cross-appellants pursuant to Supreme Court Rule 28.1 is set forth at pages 11-15, *infra*.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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**ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY,
BURLINGTON NORTHERN INC.,
CHESAPEAKE AND OHIO RAILWAY COMPANY,
BALTIMORE AND OHIO RAILROAD COMPANY, and
UNION PACIFIC RAILROAD COMPANY,**

*Cross-Appellants,*

v.

**NATIONAL RAILROAD PASSENGER CORPORATION,**

*Cross-Appellee.*

---

**On Cross-Appeal from the United States Court of Appeals for the Seventh Circuit**

---

## JURISDICTIONAL STATEMENT ON CROSS APPEAL

---

Cross-appellee National Railroad Passenger Corporation ("Amtrak") filed on March 9, 1984, its jurisdictional statement (No. 83-1492) on appeal from a judgment of the United States Court of Appeals for the Seventh Circuit, dated December 13, 1983. Cross-appellants Atchison, Topeka and Santa Fe Railway Company, Burlington Northern Inc., Chesapeake and Ohio Railway Company, Baltimore and Ohio Railroad Company, and Union Pacific Railroad Company ("Railroads") hereby submit their jurisdictional statement on cross-appeal pursuant to Supreme Court Rule 12.4.

## OPINIONS BELOW

This case was commenced in the United States District Court for the Northern District of Illinois, Eastern Division, and was designated No. 80-C-6749. The Court's Memorandum Opinion and Order, issued on November 22, 1982, by the Honorable Bernard M. Decker, is unreported. It is reprinted in the Appendix to the Jurisdictional Statement of Amtrak in No. 83-1492 ("Amtrak Appendix") at p. 11a.

The decision of the United States Court of Appeals for the Seventh Circuit, issued on December 13, 1983, is reported as *Atchison, Topeka, and Santa Fe Railway v. National Railroad Passenger Corp.*, 723 F.2d 1298 (7th Cir. 1983), and is reprinted at Amtrak Appendix, p. 1a.

## BASIS FOR JURISDICTION

Amtrak filed a Notice of Appeal in the U.S. Court of Appeals for the Seventh Circuit on January 10, 1984. Amtrak's jurisdictional statement filed in this Court (No. 83-1492) was received by the Railroads on March 12, 1984. This cross-appeal is docketed under Supreme Court Rule 12.4.

Amtrak asserts that jurisdiction to entertain its appeal lies under 28 U.S.C. §1252. If such jurisdiction exists, then jurisdiction also lies under that statute with respect to the Railroads' cross-appeal. *Regan v. Taxation with Representation*, 103 S.Ct. 1997, 1999 n.3 (1983).



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### a. Constitutional Provisions

*Fifth Amendment, United States Constitution:*

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

### b. Statutory Provisions

The statute at issue in this case is the Rail Passenger Service Act, Pub. L. No. 91-518, 84 Stat. 1328, 45 U.S.C. §501 *et seq.* (1976), as amended, and in particular sections 401 and 405(f) of that statute, 45 U.S.C. §§561, 565(f), as amended by Pub. L. No. 92-316, 86 Stat. 227, by the Amtrak Reorganization Act of 1979, Pub. L. No. 96-73, 93 Stat. 537, and by the Amtrak Improvement Act of 1981, Pub. L. No. 97-35, 95 Stat. 687. These provisions are set out at Amtrak Appendix, pp. 40a-45a, except for the 1981 Amendment, which merely made permanent the changes in section 405(f) effected by the 1979 amendment.

## STATEMENT OF THE CASE

Prior to May 1, 1971, the cross-appellant Railroads provided intercity rail passenger service to the public. As an incident to this service, the Railroads allowed their employees and their families to travel free or for reduced fares on the passenger trains they operated, but only to the extent that space was available. When the Railroads discontinued passenger trains, as they were doing with some frequency in the years prior to May 1, 1971, the employee transportation privileges (often referred to as "employee pass privileges") were diminished to that extent.

In 1970 Congress enacted the Rail Passenger Service Act ("RPSA") which offered the Railroads an expedited means of discontinuing intercity rail passenger service. Section 401 of the Act, 45 U.S.C. §561, provided that railroads which entered into a specified contract with a new National Rail Passenger Corporation—Amtrak—and paid substantial sums to help capitalize Amtrak would be relieved of their "entire responsibility for the provision of intercity rail passenger service."

The five cross-appellant Railroads all accepted that offer. They executed the required contracts and collectively paid Amtrak over $80 million. As provided in the RPSA, they then gave the required notice and discontinued all of their intercity rail passenger service, including employee pass privileges, on May 1, 1971. Amtrak began operating its own passenger trains and commenced its own pass rider programs, for which it assumed the entire financial responsibility.



In 1972 Congress enacted Pub. L. No. 92-316, which added Section 405(f) to the Rail Passenger Service Act. Section 405(f) required Amtrak to provide transportation privileges on a "space available" basis to Railroad employees and their families who had them on April 30, 1971, and also required the Railroads to pay the "cost" of these privileges. Acting pursuant to related provisions of Section 405(f), the Interstate Commerce Commission concluded that this cost was less than one-tenth of a cent per mile, and that the cost was more than covered by the half-fares that some pass riders paid. *Cost Reimbursement, Rail Passenger Service Act*, 347 I.C.C. 325 (1972), as subsequently corrected by unpublished order.

In 1979 Congress passed Pub. L. No. 96-73, which further amended Section 405(f) to require the Railroads to pay, not just the cost of employee passes, but an amount for each mile of pass travel equal to 25 percent of Amtrak's system-wide average revenue per mile. This payment requirement, which has amounted to more than 2 cents per mile, applied equally to free employee travel and half-fare travel. The 1979 amendment was originally effective for only two years, but it was made permanent in 1981 by Pub. L. No. 97-35. The Railroads have been required to pay Amtrak more than $5 million thus far under the payment formula adopted in 1979.

In December 1980 the Railroads filed this action against Amtrak claiming, *inter alia*, that the payment requirement of the 1979 amendment was unenforceable under the Fifth Amendment because it impaired the rights which the Railroads had acquired by entering into contracts with Amtrak under the RPSA. The Railroads demanded a money judgment for all sums paid to Amtrak under the 1979 amendment and also a declaratory judgment that

they could not be required to make any such payments. The Railroads subsequently amended their complaint to also challenge, on the same grounds, the 1981 amendment to Section 405(f) which made the payment requirement permanent.

The contract impairment claim was based on two theories. First, the Railroads contended that, because pass privileges to employees had always been an integral part of the provision of rail passenger service to the public, the Railroads' release from their "entire responsibility for the provision of intercity rail passenger service" included a release from any responsibility for employee passes. Second, the Railroads contended that, because the required payments exceed in their entirety the cost of employee passes as found by the Interstate Commerce Commission, the payments constituted a forced subsidy of intercity rail passenger service to the public, from which the Railroads had clearly been relieved of responsibility. The Railroads moved for summary judgment in the District Court on the first of these grounds, and Amtrak and the United States (which had intervened as a defendant under 28 U.S.C. §2403) also moved for summary judgment.

On November 22, 1982, the District Court entered an order granting the summary judgment motions of Amtrak and the United States. The Railroads appealed this decision to the Court of Appeals for the Seventh Circuit. On December 13, 1983, the Court of Appeals entered its decision affirming in part and reversing in part. The Court of Appeals agreed with the District Court that employee pass privileges were not a part of the "intercity rail passenger service" from which the Railroads were relieved of responsibility (Amtrak Appendix, pp. 4a-7a). The Court of Appeals further concluded, however, that the challenged payment requirement forced the Railroads to



pay more than the cost of employee passes and therefore to subsidize intercity rail passenger service to the public, from which the Railroads *had* been relieved of responsibility (Amtrak Appendix, pp. 7a-10a). It thus held that the payment requirement could not be enforced by Amtrak.

Because Amtrak has sought to appeal the decision of the Court of Appeals to this Court, the Railroads are filing this cross-appeal pursuant to Supreme Court Rule 12.4 with respect to the issue on which the Court of Appeals agreed with the District Court.

## REASONS FOR CONSIDERATION OF THE CROSS-APPEAL

The Railroads have filed this cross-appeal because reversal of the decision of the Court of Appeals on the question presented by the cross-appeal may entitle them to a broader measure of relief than the Court of Appeals granted. *See Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1972). Although the decision of the Court of Appeals appears to require entry of judgment in favor of the Railroads for the money damages claimed in this action, it does not support the declaratory judgment sought by the Railroads as to their release from all responsibility for intercity rail passenger service provided to their employees by Amtrak. Reversal of the Court of Appeals on the question presented by the cross-appeal would support such relief.

Accordingly, if the Court decides to set the Amtrak appeal for plenary hearing, it should do so with respect to

the cross-appeal as well. The legal issues raised by the cross-appeal will be before the Court in any event because under Supreme Court Rule 10.5 the Railroads may defend the judgment below "on any ground that the law and record permit." Allowing the cross-appeal will permit the Court to effect more complete relief between the parties without expanding the scope of the case.

There is, moreover, substantial basis for the Railroads' contention that the Court of Appeals erred in concluding that the Railroads were not relieved from responsibility for employee pass privileges. Section 102(5) of the RPSA, 45 U.S.C. Sec. 502(5), defines the "intercity rail passenger service" from which the Railroads were relieved of responsibility in broad terms that do not include any exception for intercity rail passenger service to employees. Furthermore, under the circumstances existing in 1970 it was commonly understood that employee pass privileges were one of the burdens of providing rail passenger service to the public and that railroads expected to be released from any obligation for passes when they discontinued passenger trains. Amtrak itself so construed the effect of the release granted under the RPSA, until Congress subsequently attempted to reimpose such an obligation through the enactment of Section 405(f).



## CONCLUSION

For the foregoing reasons, in the event that Amtrak's appeal is set for plenary hearing, this cross-appeal should likewise be set for plenary hearing.

Respectfully submitted,

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April 6, 1984

* Counsel of Record

## STATEMENT OF CROSS-APPELLANTS PURSUANT TO RULE 28.1

1. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

The parent companies of Atchison, Topeka and Santa Fe Railway Company ("ATSF") are Santa Fe Industries, Inc. and Santa Fe Southern Pacific Corporation. Subsidiaries and affiliates of ATSF (other than wholly-owned subsidiaries) are as follows:

*Subsidiaries*:

Alameda Belt Line
The Oakland Terminal Railway
Oklahoma City Junction Railway Company
St. Joseph Terminal Railroad Company
Sunset Railway Company

*Affiliates*:

Southern Pacific Company
Southern Pacific Transportation Company*
St. Louis Southwestern Railway Company*
The Alton and Southern Railway Company
Central California Traction Company
Arkansas and Memphis Railway and Bridge Company
Portland Traction Company
Advertising Direction, Inc.
Kirby Forest Industries, Inc.
Limited Partnership Management, Inc.
Robert E. McKee, Inc.
SF Minerals Corporation

* Held in independent voting trust pending Interstate Commerce Commission approval of control by Santa Fe Southern Pacific Corporation.

Santa Fe Capital, Inc.
Standard Office Building Corporation
Santa Fe Land Improvement Company
Santa Fe Natural Resources, Inc.
Santa Fe Pacific Railroad Company
Santa Fe Pipelines, Inc.
Santa Fe Trail Transportation Company
The Zia Company
Bankers Leasing and Financial Corporation
Ticor 130, Inc.
Bravo Oil Company
One Market Street Properties, Inc.
Southern Pacific Development Company
Southern Pacific Industrial Development Company
Southern Pacific Land Company
Sunset Communications Company
Southern Pacific Pipe Lines, Inc.
Pacific Petroleum Pipe Lines, Inc.
Sopac Finance N.V.
Sunset Insurance Company
Tops On-Line Services, Inc.

2. BURLINGTON NORTHERN INC.

Burlington Northern Inc. has no parent company. Its direct and indirect subsidiaries (other than wholly owned subsidiaries) are as follows:

The Belt Railway Company of Chicago
Camas Prairie Railroad Company
Chicago Union Station Company
Davenport, Rock Island and North Western Railway Company
The Denver Union Terminal Railway Company
Galveston Terminal Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company



The Lake Superior Terminal and Transfer Railway Company
Longview Switching Company
The Minnesota Transfer Railway Company
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
The Pueblo Union Depot and Railroad Company
The Saint Paul Union Depot Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company
Winona Bridge Railway Company
Butte Pipe Line Company
Portal Pipe Line Company
New Mexico and Arizona Land Company
The El Paso Company
A.L.A. Corporation
Desert American Insurance Agency—Colorado, Ltd. (Voting Interest)
Desert American Insurance Agency, Inc.—Arizona
Desert American Insurance Agency, Inc.—California
Desert American Insurance Agency, Inc.—New Mexico
Desert American Insurance Agency, Inc.—Virginia
El Paso Natural Gas Company

3. CHESAPEAKE AND OHIO RAILWAY COMPANY
BALTIMORE AND OHIO RAILROAD COMPANY

The parent company of Baltimore and Ohio Railroad Company ("B&O") is Chesapeake and Ohio Railway Company ("C&O"). The parent company of C&O is CSX Corp. Direct and indirect subsidiaries and affiliates of B&O and C&O with publicly held shares are as follows:

Richmond, Fredricksburg and Potomac Railroad
Chicago South Shore and South Bend Railroad
Allegheny and Western Railway Company
The Baltimore and Cumberland Valley Rail Road Extension Company
The Baltimore and Philadelphia Railroad Company
Cincinnati Inter-Terminal Railroad Company
Clearfield and Mahoning Railway Company
The Cleveland Terminal and Valley Railroad Company
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
The Home Avenue Railroad Company
Winchester and Potomac Railroad Company

4. UNION PACIFIC RAILROAD COMPANY

The parent company of Union Pacific Railroad Company is Pacific Rail System, Inc. The parent company of Pacific Rail System, Inc. is Union Pacific Corporation. The subsidiaries and affiliates of Union Pacific Railroad Company are as follows:

Watsatch Insurance Limited
UP Subsidiary Corporation
UP Leasing Corporation
Pacific Subsidiary, Inc.
Union Subsidiary, Inc.
Champlin Petroleum Company
Upland Industries Corporation
Rocky Mountain Energy Company
Mount Hood Railway Company
Portland Traction Company
Spokane International Railroad Company
The Ogden Union Railway & Depot Company
The St. Joseph & Grand Island Railway Company
St. Joseph Terminal Railway Company
Oregon Short Line Railroad Company
Los Angeles & Salt Lake Railroad Company



Oregon-Washington Railroad & Navigation Company
Camas Prairie Railroad Company
Des Chutes Railroad Company
Yakima Valley Transportation Company
Union Pacific Freight Services Company
Union Pacific Fruit Express Company
Union Pacific Motor Freight Company
The Western Pacific Railroad Company
Sacramento Northern Railway
Alameda Belt Line
Oakland Terminal Railway
Tidewater Southern Railway Company
Standard Realty and Development Company
WPX Freight System, Inc.
Delta Finance Company, Ltd.
Missouri Pacific Corporation
Missouri Pacific Railroad Company
American Refrigerator Transit Co.
The Alton & Southern Railway Company
Chicago Heights Terminal Transfer Railroad Co.
Missouri Pacific Truck Lines
Jefferson Southwestern Railroad Co.
Brownsville & Matamoros Bridge Co.
Doniphan, Kensett & Searcy Railroad
Galveston, Houston and Henderson Railroad Co.
MP Equipment Corporation
MP Redevelopment Company
Missouri Improvement Co.
Southern Illinois and Missouri Bridge Co.
Houston Belt & Terminal Railway Co.
Texas & Missouri Pacific Railroad Co.
The Weatherford Mineral Wells and Northwestern

# APPELLEE'S

# BRIEF

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CLERK

No. 83-1633

# In the Supreme Court of the United States

OCTOBER TERM, 1984

ATCHISON, TOPEKA, AND SANTA FE RAILWAY CO., ET AL., CROSS-APPELLANTS

*v.*

NATIONAL RAILROAD PASSENGER CORPORATION

*ON CROSS-APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

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# In the Supreme Court of the United States

OCTOBER TERM, 1984

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No. 83-1633

ATCHISON, TOPEKA, AND SANTA FE RAILWAY CO., ET AL., CROSS-APPELLANTS

*v.*

NATIONAL RAILROAD PASSENGER CORPORATION

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*ON CROSS-APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES**

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In No. 83-1492, the National Railroad Passenger Corporation (Amtrak) has asked this Court to review the court of appeals' holding invalidating the pass-rider reimbursement formula contained in a 1979 amendment to the Rail Passenger Service Act (RPSA), 45 U.S.C (& Supp. V) 501 *et seq.* The United States, which intervened in this action to defend the constitutionality of the statute, has urged the Court to note probable jurisdiction of Amtrak's appeal. See Memorandum for the United States as Appellee in Support of the Appellant, No. 83-1492 (filed Mar. 29, 1984). The facts of the case are set forth in that Memorandum and in Amtrak's Jurisdictional Statement.

The railroads (cross-appellants here) now ask this Court to consider whether their release under the RPSA from the obligation of providing intercity rail passenger service gave them permanent and total immunity from reimbursing

Amtrak for pass rides undertaken by their employees and former employees. Amtrak's appeal concerns the validity of the particular reimbursement formula chosen by Congress, while the railroads in their cross-appeal contend that *no* reimbursement requirement is constitutionally permissible. Thus, the issue pressed by the railroads, which both the district court and the court of appeals decided adversely to the railroads, presents a threshold question that should be considered prior to deciding the issue raised by Amtrak's appeal.

It is therefore respectfully submitted that, if the Court notes probable jurisdiction of Amtrak's appeal, No. 83-1492, probable jurisdiction should also be noted of the cross-appeal.[1]

REX E. LEE
*Solicitor General*

JULY 1984

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[1]The railroads do not seek independent consideration of their cross-appeal (see 83-1633 J.S. 9). Thus, the Court should note probable jurisdiction over the cross-appeal only in the event that it does likewise in Amtrak's appeal.

# APPELLEE'S

# BRIEF

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No. 83-1633

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BURLINGTON NORTHERN, INC.,
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BALTIMORE AND OHIO RAILROAD COMPANY, and
UNION PACIFIC RAILROAD COMPANY,
*Cross-Appellants,*

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
*Cross-Appellee.*

---

**On Cross-Appeal from the United States Court of Appeals for the Seventh Circuit**

---

## MEMORANDUM OF CROSS-APPELLEE NATIONAL RAILROAD PASSENGER CORPORATION

---

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IN THE

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OCTOBER TERM, 1983

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No. 83-1633

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ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY,
BURLINGTON NORTHERN, INC.,
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BALTIMORE AND OHIO RAILROAD COMPANY, and
UNION PACIFIC RAILROAD COMPANY,
*Cross-Appellants,*

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
*Cross-Appellee.*

---

**On Cross-Appeal from the United States Court of Appeals for the Seventh Circuit**

---

## MEMORANDUM OF CROSS-APPELLEE NATIONAL RAILROAD PASSENGER CORPORATION

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The National Railroad Passenger Corporation ("Amtrak"), cross-appellee in this proceeding, hereby submits this Memorandum in response to the cross-appeal filed on April 26, 1984, by the cross-appellant Railroads. This Memorandum is filed in accordance with the request of the Clerk of the Court dated June 14, 1984.

On March 9, 1984, Amtrak filed a Jurisdictional Statement to docket its appeal from a decision of the U.S. Court of Appeals for the Seventh Circuit striking down a portion of the Rail Passenger Service Act, 45 U.S.C.

§ 501 *et seq.* The Court of Appeals held that the Railroads were not relieved of all financial responsibility for their employees' pass travel on Amtrak when they transferred their passenger operations to Amtrak in 1971. The court went on to hold, however, that when Congress in 1979 required the Railroads to pay Amtrak amounts in excess of the costs Amtrak actually incurred in providing such pass travel, Congress violated their contract right to be free of all obligations to subsidize intercity rail passenger service. Amtrak appealed and argued *inter alia* that there is no constitutional basis for limiting the compensation Congress can require to the level of incremental costs associated with pass travel. The Railroads cross-appealed and argued that Congress could not require them to provide any compensation whatsoever to Amtrak without impermissibly impairing their contract rights.

Amtrak submits that the Railroads' contention in their cross-appeal is so plainly without merit as to require no further argument.[1] This Court has before it a record sufficient to justify summary affirmance of the Court of Appeals' ruling that the Railroads have not been relieved of all financial responsibility for employee pass travel on Amtrak. Amtrak also submits, however, that if the Court notes probable jurisdiction in Amtrak's appeal,

[1] Prior to Amtrak's creation in 1971, when the Railroads operated passenger service for their own account, they had no responsibility to provide pass privileges to their employees and former employees. The Railroads themselves argued this point before the District Court below. Plaintiffs' Memorandum in Support of Motion for Summary Judgment, Court of Appeals Record R. 25, at 6; Plaintiffs' Reply Memorandum, R. 50, at 35. It follows that in 1971, when Congress relieved railroads transferring passenger service to Amtrak of all responsibility under Part I of the Interstate Commerce Act to provide intercity rail passenger service, the relief it was affording could not have had any relation to employee pass privileges. The District Court and the Court of Appeals below both readily concluded that Congress had not promised the Railroads relief from all future responsibility for employee pass travel.



No. 83-1492, it may well be more efficient for the Court to docket the cross-appeal and address it together with Amtrak's appeal, rather than consider summary affirmance at this point. Any foreseeable resolution of the question posed by Amtrak's appeal—whether Congress may require compensation in excess of incremental costs—will necessarily embrace the question posed by the Railroads' cross-appeal—whether any compensation whatsoever may be required. Accordingly, Amtrak requests that if the Court notes probable jurisdiction over Amtrak's appeal, probable jurisdiction should also be noted over the Railroads' cross-appeal.[2]

Respectfully submitted,

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[2] The Railroads have not requested independent consideration of their cross-appeal in the event the Court declines to note probable jurisdiction over Amtrak's appeal, and Amtrak submits that such independent consideration would not be warranted.

# JOINT APPENDIX

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Nos. 83-1492 and 83-1633

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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NATIONAL RAILROAD PASSENGER CORPORATION,
*Appellant,*

v.

ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, *et al.*,
*Appellees.*

---

ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, *et al.*,
*Appellants,*

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
*Appellee.*

---

**On Appeals from the United States Court of Appeals for the Seventh Circuit**

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## JOINT APPENDIX

---

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---

APPEAL DOCKETED MARCH 9, 1984—No. 83-1492
APPEAL DOCKETED APRIL 6, 1984—No. 83-1633
PROBABLE JURISDICTION NOTED IN No. 83-1492 AND POSTPONED IN No. 83-1633 ON OCTOBER 1, 1984

BEST AVAILABLE COPY

105 pp

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| | No. 80-C-6749 |
| Dec. 19, 1980 | Complaint and Summons |
| Feb. 9, 1981 | Answer |
| Sep. 9, 1981 | Plaintiffs' Motion for Summary Judgment |
| Oct. 19, 1981 | Notice/Motion to Intervene of the United States |
| Oct. 27, 1981 | Order Granting Motion of the United States to Intervene as a Defendant |
| Nov. 5, 1981 | Defendant National Railroad Passenger Corporation's Cross-Motion for Summary Judgment |
| Nov. 20, 1981 | Intervenor—Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment |
| Jan. 12, 1982 | First Amendment to Complaint |
| Nov. 22, 1982 | Memorandum Opinion and Order granting Defendant's and Intervenor—Defendant's Cross-Motions for Summary Judgment |
| Dec. 20, 1982 | Notice of Appeal of Plaintiffs |
| | UNITED STATES COURT OF APPEALS<br>FOR THE SEVENTH CIRCUIT |
| | No. 82-3057 |
| Dec. 13, 1983 | Memorandum Opinion and Order |
| Jan. 10, 1984 | Notice of Appeal of National Railroad Passenger Corporation |
| Jan. 12, 1984 | Notice of Appeal of the United States |

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

---

No. 80-C-6749

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BURLINGTON NORTHERN INC., CHESAPEAKE AND OHIO RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, and UNION PACIFIC RAILROAD COMPANY,
*Plaintiffs,*

vs.

NATIONAL RAILROAD PASSENGER CORPORATION,
*Defendant.*

---

**COMPLAINT**

Plaintiffs The Atchison, Topeka, and Santa Fe Railway Company ("ATSF"), Burlington Northern Inc. ("BN"), Chesapeake and Ohio Railway Company ("C&O"), Baltimore and Ohio Railroad Company ("B&O"), and Union Pacific Railroad Company ("UP") (collectively "Railroad Plaintiffs"), by their attorneys, hereby complain of defendant National Railroad Passenger Corporation ("Amtrak") as follows:

*COUNT I*

1. Plaintiff ATSF is a Delaware corporation with its principal place of business in Topeka, Kansas and is engaged in the business of operating a railroad in Chicago, Illinois and in various areas of the United States west of Chicago, Illinois.

2. Defendant Amtrak is a corporation organized under the laws of the United States and of the District of Co-



lumbia with its headquarters in Washington, D.C. Amtrak is and has since May 1, 1971 been engaged in the business of offering railroad passenger transportation services throughout the United States, including Chicago, Illinois, and contracting with railroads such as Railroad Plaintiffs for the use of their track, facilities and other services to provide such passenger transportation services.

3. The claims asserted herein arise under 28 U.S.C. § 2201, 45 U.S.C. § 561, 45 U.S.C. § 562, 45 U.S.C. § 565 (f), the Fifth Amendment to the United States Constitution, and under the law of contracts. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1332, and 28 U.S.C. § 1337. The amount in controversy exceeds $10,000, exclusive of interest and costs.

4. On and before April 30, 1971, ATSF was engaged in the business of offering and providing railroad passenger transportation services. Such services were offered by ATSF as a common carrier under the Interstate Commerce Act, and its right to withdraw from such passenger transportation business was restricted by such Act. As a part of its passenger transportation business, ATSF offered free or reduced-rate transportation privileges over its own lines to its then present and retired employees and their dependents in accordance with the policy set forth in Exhibit A hereto. Such free or reduced-rate transportation privileges were not required to be provided pursuant to any contract between ATSF and its employees. ATSF did not, as of April 30, 1971, offer to its then present and retired employees or their dependents free or reduced-rate transportation privileges over lines of other railroads.

5. In 1970 the National Rail Passenger Service Act (the "Act"), 45 U.S.C. § 501, *et seq.*, was enacted. Section 401 of the Act, 45 U.S.C. § 561, authorized Amtrak to enter into contracts with railroads relieving them of

their entire responsibility for the provision of intercity rail passenger service. ATSF entered into such a contract with Amtrak, effective April 16, 1971, which contract expressly provided, in paragraph 2.1, that ATSF was relieved "of its entire responsibility for the provision of Intercity Rail Passenger Service" from and after May 1, 1971. A copy of such contract (the "Basic Agreement") is attached hereto as Exhibit B. Under the Basic Agreement and the applicable provisions of the Act, ATSF was required to pay as consideration for being relieved of responsibility to provide intercity rail passenger service an amount equal to 50% of ATSF's fully distributed passenger service deficit for the year ending December 31, 1969. ATSF has in fact paid such amount, which totalled $21,053,773. In accordance with the Basic Agreement and the Act, ATSF on May 1, 1971 ceased offering intercity rail passenger service, including free or reduced-rate passenger service to its present and retired employees and their dependents.

6. Under the provisions of the Act, Amtrak undertook to offer intercity rail passenger services subsequent to April 30, 1971 over certain railroad lines, including the lines of Railroad Plaintiffs. Amtrak further agreed to pay Railroad Plaintiffs and other railroads for the use of their tracks, facilities and other services to provide such passenger services. The agreement to pay for such services was included in the Basic Agreements between Amtrak and Railroad Plaintiffs.

7. Paragraph 7.5 of the Basic Agreement provides that "transportation privileges, if any, with respect to business and personal travel of railroad personnel shall be determined by [Amtrak]." Pursuant to this paragraph, Amtrak upon initiating its intercity rail transportation services on May 1, 1971 voluntarily undertook to provide free or reduced-rate services to the employees of Railroad Plaintiffs. No attempt was made by Amtrak



to charge Railroad Plaintiffs or other railroads for providing such services.

8. On June 22, 1972, Public Law 92-316 ("P.L. 92-316") was enacted, adding Section 405(f) to the Act, 45 U.S.C. § 565(f). P.L. 92-316 required Amtrak to offer free or reduced-rate rail transportation services to present and retired railroad employees and their dependents who had been eligible to receive such free or reduced-rate services on April 30, 1971. In addition, P.L. 92-316 provided that Amtrak should be reimbursed by the railroads "for such costs as may be incurred" by Amtrak in offering such services. P.L. 92-316 further provided that if Amtrak and the railroads were unable to agree as to costs of such services, the matter was to be referred to the Interstate Commerce Commission for decision.

9. Pursuant to P.L. 92-316, Amtrak adopted a policy whereby it offered to all present and retired employees and their dependents who had been eligible to receive free or reduced-rate rail transportation services on April 30, 1971 free transportation privileges over the lines of their home railroad and half-fare transportation privileges over lines of other railroads, subject to the availability of space, with certain limitations on such travel for persons employed less than nine years on April 30, 1971. Amtrak has continued to offer such free or reduced-rate transportation privileges to such present and retired employees and their dependents from 1972 to the present date.

10. Amtrak and the railroads were unable to agree on the costs of providing such free or reduced-rate transportation services, and the matter was referred to the Interstate Commerce Commission. In a decision in Finance Docket No. 27194 dated December 18, 1972, the Commission set an "interim payment" rate of $0.00079 per passenger mile, based on preliminary evidence of the costs of providing free or reduced-rate transportation on a space-available basis. The Commission further deter-

mined that such compensation would be reduced by the additional revenues earned by Amtrak from the reduced-rate fare. Because such additional revenues always exceeded the compensation owed to Amtrak based on the Commission's computation of costs, Amtrak made no attempt to charge Railroad Plaintiffs for providing free or reduced-rate transportation services (except for charges for certain administrative expenses) until after the enactment of Public Law 96-73, described in the following paragraph.

11. On September 29, 1979, P.L. 92-316 was amended by the enactment of Public Law 96-73 ("P.L. 96-73"). P.L. 96-73 substituted for the provision that Amtrak should be reimbursed "for such costs as may be incurred" a provision requiring that during the 2-year period beginning on October 1, 1979, Amtrak should be reimbursed "at the rate of 25 per cent of the systemwide average monthly yield per revenue passenger mile." Amtrak has interpreted "systemwide average yield" to mean its average revenue from all fares (except commuter fares and reduced-rate fares) on all of Amtrak's system.

12. Commencing with the month of October 1979, Amtrak has billed ATSF for free or reduced-rate rail transportation services provided by Amtrak to present and retired ATSF employees and their dependents at rates varying from $ .02016 to $ .02343 per passenger mile. Such bills for the months of October 1979 through July 1980 are attached hereto as Exhibit C.

13. Pursuant to the Basic Agreement entered into between ATSF and Amtrak, there was due and owing from Amtrak to ATSF during the month of July 1980 $2,625,000 as advances for the use of ATSF track, facilities, and other services. Amtrak has refused to pay ATSF $282,624.69 of this amount. Amtrak has also refused to pay ATSF $53,625.13 from the final settlement of amounts due and owing for the month of May 1980.



Amtrak has claimed that it is entitled to retain such amounts, which total $336,624.69, to cover the billings which are attached hereto as Exhibit C. ATSF has, however, performed all obligations under the Basic Agreement entitling it to full payment of the July advances and the May final settlement.

14. The provision of Section 401 of the Act which relieves a contracting railroad "of all its responsibilities as a common carrier of passengers by rail in intercity rail passenger service," and the provision of the Basic Agreement which specifically relieves ATSF "of its entire responsibility for the provision of intercity Rail Passenger Service," constitute binding obligations of the United States Government and of Amtrak, respectively, and are property rights protected by the Fifth Amendment to the United States Constitution.

15. The provisions of P.L. 92-316 and P.L. 96-73 which purport to require ATSF to reimburse Amtrak for providing free and reduced-rate rail transportation services to certain present and retired employees and their dependents substantially impair the aforesaid contractual obligations, in that such provisions require ATSF to pay for one type of intercity rail passenger service—the transportation of present and retired railroad employees and their dependents. Such impairment of contractual obligations constitutes a deprivation of property without due process of law in violation of the Fifth Amendment.

16. The provision of P.L. 96-73 which purports to require ATSF to reimburse Amtrak for providing such free or reduced-rate transportation services at the rate of 25 per cent of the systemwide average monthly yield per revenue passenger mile substantially impairs the aforesaid contractual obligations, in that such rate exceeds the costs of providing such service, and consequently requires ATSF to subsidize the provision of intercity rail passenger service by Amtrak to the general public. Such impairment of contractual obligations constitutes a depri-

vation of property without due process of law in violation of the Fifth Amendment.

17. There is an actual controversy between ATSF and Amtrak with respect to the right of Amtrak to reimbursement from ATSF for providing free and reduced-rate rail transportation to present and retired employees of ATSF and their dependents.

WHEREFORE, plaintiff ATSF prays that this Court:

1. Enter judgment in favor of ATSF and against Amtrak in the amount of $336,249.82, plus interest and costs.

2. Enter a further judgment declaring that Amtrak has no right to obtain reimbursement from ATSF for providing free and reduced-rate rail transportation to present and retired employees of ATSF and their dependents, and that the provisions of 45 U.S.C. § 565(f), to the extent they require such reimbursement, are invalid under the Constitution of the United States.

3. Grant ATSF such further relief as may be just and equitable.

*COUNT II*

1.-14. ATSF repeats and realleges the allegations of paragraphs 1 through 14 of Count I of this Complaint.

15. No ATSF employee or retiree (including those employees and retirees who were eligible for free or reduced-rate rail transportation services on April 30, 1971) has any contractual right to such services under any collective bargaining agreement, labor protective agreement or other agreement.

16. The availability of free or reduced-rate rail transportation services has no bearing upon the health, welfare, or safety of railroad employees. Such transportation privileges are not required to be provided to employees in any other industry.



17. The free or reduced-rate rail transportation services available to present and retired ATSF employees and their dependents from Amtrak are significantly greater than the free and reduced-rate rail transportation services which were available to such employees and their dependents from ATSF on April 30, 1971, in that, among other things, Amtrak offers such persons reduced-rate transportation over lines of other railroads, which ATSF did not offer on April 30, 1971.

18. The reimbursement required by P.L. 96-73 to be paid to Amtrak by ATSF for providing free and reduced-rate rail transportation services to ATSF employees and their dependents exceeds the costs of such services incurred by Amtrak.

19. The reimbursement required by P.L. 96-73 to be paid to Amtrak by ATSF for providing free and reduced-rate rail transportation services to ATSF employees and their dependents bears no reasonable relationship to the services provided in that such reimbursement is required to be computed at the same rate per passenger mile for reduced-rate transportation as for free transportation.

20. The free and reduced-rate rail transportation services for which ATSF is required by P.L. 92-316 and P.L. 96-73 to reimburse Amtrak includes transportation services furnished to persons who were retired from active employment with ATSF or who were dependents of persons retired from active employment with ATSF at the time such statutes were enacted, or on April 30, 1971.

21. In light of the facts alleged above, and particularly in paragraphs 15 through 20 of this Count II, the provisions of P.L. 92-316 and P.L. 96-73 purporting to require ATSF to reimburse Amtrak for providing free and reduced-rate rail transportation to present and retired employees and their dependents compel ATSF to make transfers of its property to other persons which transfers have, in whole or in part, no reasonable or

rational justification. Such transfers constitute a deprivation of property without due process of law in violation of the Fifth Amendment to the United States Constitution.

WHEREFORE, plaintiff ATSF prays that this Court:

1. Enter judgment in favor of ATSF and against Amtrak in the amount of $336,249.82, plus interest and costs.

2. Enter a further judgment declaring that Amtrak has no right to obtain reimbursement from ATSF for providing free and reduced-rate rail transportation to present and retired employees of ATSF and their dependents, and that the provisions of 45 U.S.C. § 565(f), to the extent they require such reimbursement, are invalid under the Constitution of the United States.

3. Grant ATSF such further relief as may be just and equitable.

• • • •

[Counts III, IV, V, VI, VII and VIII set forth similar allegations with respect to plaintiffs Burlington Northern, Baltimore and Ohio, Chesapeake and Ohio, and Union Pacific and are omitted in printing.]

[Exhibits A and C through I to the Complaint are omitted in printing.]

[Signatures Omitted in Printing]



EXHIBIT B TO COMPLAINT

[Table of Contents omitted in printing]

## THE NATIONAL RAILROAD PASSENGER CORPORATION AGREEMENT

---

THIS AGREEMENT, dated as of April 16, 1971, between National Railroad Passenger Corporation, a corporation organized under the Rail Passenger Service Act of 1970 (hereinafter referred to as the "Act") and the laws of the District of Columbia (hereinafter referred to as "NRPC"), and the undersigned railroad (hereinafter referred to as "Railroad").

WHEREAS, NRPC was organized pursuant to the Act for the purpose of providing modern, efficient intercity rail passenger service within a national rail passenger system;

WHEREAS, in furtherance of that purpose, NRPC desires to contract with Railroad for the acquisition or use of certain equipment and facilities and for the furnishing of certain services;

WHEREAS, NRPC is in the process of entering into a number of contracts with other railroads identical with this Agreement save as to the provisions of Appendix B;

WHEREAS, the parties desire to enter into an agreement relieving Railroad of its responsibility to perform intercity rail passenger service, and facilitating the initiation of intercity rail passenger service by NRPC, on May 1, 1971;

WHEREAS, in order to do so, Railroad is willing to waive, during an interim period, certain elements of compensation which it believes are just and reasonable

and to which it believes it would otherwise be entitled; and

WHEREAS, therefore, the parties are unable to agree within the time available prior to May 1, 1971, on a basis for compensating Railroad subsequent to July 1, 1973, for the services, equipment and facilities which Railroad is undertaking to make available to NRPC hereunder, but in order to further the purposes of the Act and permit NRPC to undertake passenger service on a timely basis, the parties are willing to enter into this Agreement which, in Article Five, provides an initial basis for compensation and for a future redetermination of the basis for compensation.

NOW, THEREFORE, in consideration of the terms and conditions herein contained, NRPC and Railroad hereby agree as follows:

## *ARTICLE ONE*

## *DEFINITIONS*

"Intercity Rail Passenger Service" means all rail passenger service over the lines of Railroad owned, leased, or operated by Railroad other than (i) commuter and other short-haul service in metropolitan and suburban areas usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations, and (ii) auto-ferry service characterized by transportation of automobiles and their occupants where contracts for such service have been consummated prior to October 30, 1970.

"Intercity Rail Passenger Trains" means all trains operated in Intercity Rail Passenger Service.

"Act" means the "Rail Passenger Service Act of 1970."

"Commission" means "Interstate Commerce Commission."

"Rail Lines" is defined in Section 4.1.



## *ARTICLE TWO*

## *TRANSFER OF PASSENGER SERVICE*

*Section 2.1. Relief from Responsibility.*

From and after May 1, 1971, Railroad shall be relieved of its entire responsibility for the provision of Intercity Rail Passenger Service. Railroad shall not, without the prior written consent of NRPC, operate or provide any regularly scheduled Intercity Rail Passenger Service except pursuant to and in accordance with this Agreement.

If, having fully complied with the notice or other provisions of Section 401(a)(1) of the Act, Railroad is required, because of any order of any Federal, State or local court or agency of government, whether or not such order is lawfully issued, to continue or resume operation of any Intercity Rail Passenger Train beyond April 30, 1971, NRPC and Railroad will cooperate in efforts to effectuate discontinuance thereof.

[Section 2.2 through 7.4 omitted in printing]

*Section 7.5. Transportation Privileges.*

Company mail of Railroad may be transported by Railroad without charge on any Intercity Rail Passenger Trains operated by it over its lines, provided that no extra or special personnel shall be required in connection with the handling thereof.

Business cars of Railroad and Railroad officials and administrative personnel transported therein may be handled on Intercity Rail Passenger Trains, provided that the same may be done consistent with the safe and efficient operation of such trains and shall not cause any material delays in the operation thereof and that any additional cost resulting therefrom will be borne by Railroad.

Railroad shall deadhead passenger cars in freight trains, at the request of NRPC, provided that the same may be done consistent with the safe and efficient operation of such freight trains and that any additional cost resulting therefrom will be borne by NRPC.

Employees of Railroad shall be entitled to ride on Intercity Rail Passenger Trains, including locomotives, without charge, whenever necessary in connection with the inspection, maintenance or operation of such trains.

Transportation privileges, if any, with respect to business and personal travel of Railroad personnel shall be as determined by NRPC.

[Remainder of Exhibit B to Complaint omitted in printing]



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted in Printing]

**ANSWER**

Defendant, National Railroad Passenger Corporation (hereinafter referred to as Amtrak), hereby answers the Complaint as follows:

FIRST DEFENSE

Defendant Amtrak hereby answers the numbered paragraphs of the Complaint as follows:

COUNT I

1. [The text of each numbered paragraph of the Complaint was set out in the Answer, but has been replaced in printing by asterisks.] * * *

Answer: Admit.

2. * * *

Answer: Admit.

3. * * *

Answer: The allegations of paragraph 3 set forth conclusions of law, not allegations of fact to which an answer is required, however, insofar as an answer may be deemed required, defendant Amtrak admits that the amount in controversy exceeds $10,000, exclusive of interest and costs, but denies the remaining allegations of this paragraph.

4. * * *

Answer: Admit that on or before April 30, 1971, ATSF was engaged in the business of offering or providing railroad passenger transportation services as a com-

mon carrier under the Interstate Commerce Act. Defendant further admits that Exhibit A to the Complaint is an authentic copy of ATSF's "pass policy," but respectfully refers the court to Exhibit A to the Complaint for a full and complete statement of the contents thereof and denies the remaining allegations of paragraph 4 of the Complaint referring to the contents of Exhibit A in that they are not a full and complete statement of the terms of Exhibit A. Defendant is without knowledge sufficient to form a belief as to the truth or falsity of the allegation that such free or reduced-rate transportation privileges were not required to be provided pursuant to any contract between ATSF and its employees. Defendant is without knowledge sufficient to form a belief as to the truth or falsity of the allegation that ATSF did not offer its then present and retired employes or their dependents free or reduced-rate transportation privileges over lines of other railroads.

5. • • •

Answer: Admit that in 1970 the National Railroad Passenger Service Act (the "Act"), 45 U.S.C. § 501, *et seq.*, was enacted, but respectfully refer the Court to the Act for a full and complete statement of its contents. Defendant admits that ATSF entered into a contract with Amtrak, effective April 16, 1971 and that Exhibit B to the Complaint is an authentic copy of such contract, but respectfully refers the court to Exhibit B to the Complaint for a full and complete statement of the contents thereof and denies the remaining allegations of paragraph 5 of the Complaint that refer to the contents of the contract in that they are not a full and complete statement of the terms of Exhibit B. Amtrak admits that ATSF has in fact paid 50% of its fully distributed passenger service deficit for the year ending December 31, 1969 which totalled $21,053,773 to Amtrak and that on May 1, 1971 ATSF ceased offering intercity rail passenger service to the public but Amtrak is without knowledge sufficient to form a belief as to the truth or falsity of the remaining allegations contained in this paragraph.



6. • • •

Answer: Admit.

7. • • •

Answer: Admit that Paragraph 7.5 of the Basic Agreement includes the quoted language but respectfully refer the Court to Paragraph 7.5 of the Basic Agreement for a full and complete statement of the contents thereof. Also admit that Amtrak did provide some reduced-rate services to the employees of Railroad Plaintiffs prior to the enactment of Public Law 92-316 and that Amtrak did not charge Railroad Plaintiffs or other railroads for such services. Amtrak denies the remaining allegations of this paragraph.

8. • • •

Answer: Defendant admits that on June 22, 1972, Public Law 92-316 ("P.L. 92-316") was enacted, adding Section 405(f) to the Act, 45 U.S.C. § 565(f) but respectfully refers the court to such statute for a full and complete statement of its contents and denies the remaining allegations of paragraph 8 of the Complaint in that they are not a full and complete statement of the contents of P.L. 92-316.

9. • • •

Answer: Admit.

10. • • •

Answer: Admit that Amtrak and the railroads were unable to agree to the cost of providing such free or reduced-rate transportation services, and the matter was referred to the Interstate Commerce Commission. Amtrak further admits that a decision in Finance Docket No. 27194 dated December 18, 1972, did make a determination on this question but respectfully refers the court

to such decision for a full and complete statement of its contents thereof and denies the remaining allegations of paragraph 10 which refer to the decision in that they are not a full and complete statement of the terms of the decision. Amtrak also admits that it did not charge Railroad Plaintiffs for providing free or reduced-rate transportation service (except for charges for certain administrative expenses) until after the enactment of Public Law 96-73.

11. • • •

Answer: Admit that on September 29, 1979, P.L. 92-316 was amended by the enactment of Public Law 96-73 ("P.L. 96-73") but respectfully refers the court to Public Law 96-73 for a full and complete statement of its contents and deny the remaining allegations of paragraph 11 which refer to the contents of Public Law 96-73 since they are not a full and complete statement of the terms of the statute. Admit that Amtrak has interpreted "systemwide average yield" to mean its average revenue from all fares (except commuter fares and reduced-rate fares) in all of Amtrak's system.

12. • • •

Answer: Admit

13. • • •

Answer: Admit that ATSF did bill Amtrak during the month of July 1980 for $2,625,000 as advances for the use of ATSF track, facilities and other services and that Amtrak has not paid $282,624.69 of this amount. Further admit that ATSF has billed Amtrak for $53,-625.13 from the final settlement of amounts claimed by ATSF for the month of May 1980 and that Amtrak has not paid this amount. Amtrak has retained $336,249.82 of the amounts billed by ATSF to cover the billings which are attached to the Complaint as Exhibit C. Amtrak denies that ATSF is entitled to full payment of the July advances and the May final settlement.



14. • • •

Answer: Deny.

15. • • •

Answer: Deny.

16. • • •

Answer: Deny.

17. • • •

Answer: Admit.

WHEREFORE, plaintiff ATSF prays that this Court:

1. • • •

Answer: Defendant denies that plaintiff is entitled to a judgment in the amount of $336,249.82 plus interest and costs, or to any relief whatsoever.

2. • • •

Answer: Defendant denies that ATSF is entitled to a judgment declaring that Amtrak has no right to obtain reimbursement from ATSF for providing free and reduced-rate transportation for present and retired employees of ATSF and their dependents, denies that ATSF is entitled to a judgment declaring that the provisions of 45 U.S.C. § 565(f), are invalid under the Constitution of the United States and denies that ATSF is entitled to any relief whatsoever.

3. • • •

Answer: Defendant denies that ATSF is entitled to any relief whatsoever.

COUNT II

1-14. • • •

Answer: Defendant repeats and realleges its responses to paragraphs 1-14 of Count I of the Complaint.

15. • • •

Answer: Defendant is without knowledge sufficient to form a belief as to the truth or falsity of the allegations contained in this paragraph.

16. • • •

Answer: Deny but defendant is without knowledge sufficient to form a belief as to the truth or falsity of the allegation that free or reduced-rate rail transportation services are not required to be provided to employees in any other industry.

17. • • •

Answer: Deny but defendant states that it is without knowledge sufficient to form a belief as to the truth or falsity of the allegation that ATSF did not offer reduced-rate transportation over lines of other railroads on April 30, 1971. Amtrak does admit that Amtrak offers such persons reduced-rate transportation over lines of other railroads.

18. • • •

Answer: Deny.

19. • • •

Answer: Deny but admit that such reimbursement is required to be computed at the same rate per passenger mile for reduced-rate transportation as for free transportation.

20. • • •

Answer: Admit.

21. • • •

Answer: Deny.

WHEREFORE, plaintiff ATSF prays that this Court:

1. • • •

Answer: Deny that ATSF is entitled to a judgment against Amtrak in the amount of $336,249.82 plus interest and costs, or to any relief whatsoever.



2. • • •

Answer: Deny that ATSF is entitled to a judgment declaring that Amtrak has no right to obtain reimbursement from it for providing free and reduced-rate rail transportation to present and retired employees of ATSF and their dependents, deny that ATSF is entitled to a judgment declaring that the provisions of 45 U.S.C. § 565(f) are invalid under the Constitution of the United States and further deny that ATSF is entitled to any relief whatsoever.

3. • • •

Answer: Defendant denies that ATSF is entitled to any relief whatsoever.

[The responses to the allegations contained in Counts III, IV, V, VI, VII and VIII of the Complaint are omitted in printing.]

Any allegations not specifically answered above are hereby denied.

## FIRST AFFIRMATIVE DEFENSE

This dispute in part concerns the interpretation, application and implementation of the "Basic Agreements," as amended, between plaintiffs and defendant (Exhibit B to the Complaint) and must be submitted to binding arbitration in accordance with Article 6 of the Basic Agreements.

## SECOND AFFIRMATIVE DEFENSE

The Complaint fails to state a claim against defendant upon which relief can be granted.

WHEREFORE, having fully answered, defendant Amtrak prays for dismissal of this action, judgment in its favor and such other and further relief as the Court may deem appropriate.

[Signatures Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted in Printing]

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

P'aintiffs Atchison, Topeka and Santa Fe Railway Company, Burlington Northern, Inc., Chesapeake and Ohio Railway Company, Baltimore and Ohio Railroad Company, and Union Pacific Railroad Company hereby move this Court, pursuant to Rule 56, Federal Rules of Civil Procedure, for summary judgment in their favor on all counts of the Complaint herein.

Plaintiffs are submitting to the Court herewith Affidavits of D.G. Ruegg, W.J. Taylor, R.K. Knowlton, W.F. Howes, Jr., J.R. Davis, J.P. Deasey, and F.S. Farrell in support of this Motion, together with a supporting Memorandum.

[Signatures Omitted in Printing]



[EXHIBIT A to the affidavit of R.K. Knowlton filed in support of Plaintiffs' Motion for Summary Judgment]

INTERSTATE COMMERCE COMMISSION

SERVICE DATE
December 20, 1972

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Finance Docket No. 27194

DETERMINATION OF COST REIMBURSEMENT UNDER SECTION 405(f) OF THE RAIL PASSENGER ACT, AS AMENDED.

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*Decided December 18, 1972*[*]

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Upon investigation: Proposed cost reimbursement to National Railroad Passenger Corporation by all railroads for providing free and reduced-rate transportation to employees, retirees, and dependents of each railroad, pursuant to Section 405(f) of the Rail Passenger Service Act of 1970, as amended by P.L. 92-316, who are eligible for such transportation, found not shown to be just and reasonable. Interim just and reasonable allowances determined.

*William C. Clarke* and *T. Page Sharp* for petitioner. *John W. Adams, James A. Bistline, Donald A. Brinkworth, Donald A. Engle, Richard K. Knowlton, William M. Moloney, Raymond E. Skov*, and *Erle J. Zoll, Jr.*, for respondents. *Edward J. Hickey, Jr., William J. Hickey, William G. Mahoney*, and *Geoffrey N. Zeh*, for intervenors.

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[* On December 21, 1972, the Commission notified all parties of "certain ministerial errors" in its Report and Order of December 18, 1972. The corrected versions of the Report and Order are set forth in this Joint Appendix; the uncorrected version of the Report appears at 347 ICC 325 (1972).]

## REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, BREWER, AND MONTEJANO BY THE DIVISION:

We are asked in this proceeding to determine that 8.6¢ per passenger-mile is a just and reasonable amount by which the railroad should reimburse the National Railroad Passenger Corporation (AMTRAK) for providing free or reduced-rate transportation to railroad employees and retirees, and their dependents (hereinafter referred to collectively as employees), under Section 405(f) of the Rail Passenger Service Act of 1970 (the Act), as amended by P.L. 92-316, effective June 22, 1972. We are also requested to determine that the actual costs incurred by Amtrak in implementing and administering the requirements of said section 405(f) should be billed to the railroads as incurred, allocated on the basis of the number of pass riders from each railroad, and that the obligation for reimbursement shall be with the railroad having the employment relationship with the eligible employee.

The requests were made by Amtrak through a petition filed September 21, 1972, pursuant to the Section 405(f). On October 10, 1972, the railroads filed a motion to dismiss for lack of jurisdiction and an alternative reply to Amtrak's petition.

Section 405(f) reads as follows:

> The Corporation shall take such action as may be necessary to assure that, to the maximum extent practicable, any railroad employee eligible to receive free or reduced-rate transportation by railroad on April 30, 1971, under the terms of any policy or agreement in effect on such date will be eligible to receive, provided space is available, free or reduced-rate transportation on any intercity rail passenger service provided by the Corporation under this Act, on terms similar to those available on such date to such railroad employee under such policy or agreement. However, the Corporation may apply to all



> railroad employees eligible to receive free or reduced-rate transportation under such policies or agreement, a single systemwide schedule of terms determined by the Corporation to reflect terms applicable to the majority of such employees under those policies or agreements in effect on April 30, 1971. *The Corporation shall be reimbursed by the railroads by way of payment or offset for such costs as may be incurred in providing transportation services to railroad employees under any policy or agreement referred to in the first sentence of this subsection, including the costs of implementing and administering this section.* Within ninety days after the enactment of this sentence, each railroad shall enter into an agreement with the Corporation for the payment of such expenses. *If the Corporation and a railroad are unable to agree as to the amount of any payment owed by the railroad under this subsection, the matter shall be referred to the Commission for decision. The Commission, upon investigation, shall decide the issue within ninety days following the date of referral, and the decision shall be binding on both parties.* If any railroad company which operates intercity passenger service not under contract with the Corporation notified the Corporation and railroads which have entered into the agreement specified above that it will accept the terms of the system-wide schedule of terms and the compensation specified in the agreements, such railroad company shall be reimbursed for services to railroad employees in accordance with the agreements. As used in this subsection, the term 'railroad employee' means (1) an active fulltime employee, including any such employee during a period of furlough or while on leave of absence, of a railroad or terminal company, (2) a retired employee of a railroad or terminal company and (3) the dependents of any employee referred to

in clause (1) or (2) of this sentence. (Emphasis added.)

Negotiations during the 90-day period following enactment of Section 405(f) were unsuccessful, and, the matter was immediately thereafter presented to us for resolution. The Act provides that this Commission shall decide the issue within ninety days following the date of referral, that is, by December 20, 1972. In view of that statutory time limitation, the modified procedure was employed to expedite disposition.

Pursuant to that procedure, Amtrak filed its position statement on October 19, 1972; the railroads followed with their statement on November 3, 1972; and Amtrak filed a reply statement on November 13, 1972. The Congress of Railroad Unions (CRU) was granted permission to intervene on November 2, 1972, and filed a statement on November 3, 1972. The Railway Labor Executives' Association (RLEA) was denied permisison to intervene on November 10, 1972. Upon consideration of the petition of RLEA that its intervention will not delay this proceeding, permission to intervene is hereby granted, and the RLEA statement of position, submitted November 1, 1972, is accepted for filing.

On November 27, 1972, the railroads moved for leave to file a supplemental statement tendered therewith, on grounds that Amtrak, in its rebuttal, introduced evidence not included in its initial statement, and that such evidence was available for submission in the initial statement. Additionally, they contend that the CRU statement contains an argument which the railroads should be allowed to answer. Upon consideration of the new evidence in the Amtrak rebuttal statement and of the CRU argument, we conclude that the motion for leave should be granted and that the supplemental statement of position tendered on November 27, 1972, should be, and it is hereby, accepted for filing in this proceeding.



On November 30, 1972, the railroads also filed a petition requesting this Commission to investigate and determine the costs of implementing and administering the proposed Amtrak pass policy; however, on December 19, 1972, Amtrak and the railroads filed a joint motion for dismissal of this petition on the ground that they had reached agreement as to the cost of implementing and administering the pass policy. The motion was granted by order of December 19, 1972. This matter will not be further considered. Also, on December 8, 1972, Amtrak filed a motion seeking leave to file Exhibit No. NRPC-8, and the railroads filed an answer to this motion on December 14, 1972. Finally, on December 13, 1972, CRU filed a reply to the supplemental statement of the railroads.

On December 8, 1972, Amtrak entered an answer to the railroads motion for leave to file a supplemented statement or in the alternative to file a surrebuttal statement tendered therewith in order that they may correct errors of fact and misconceptions in the railroads' supplemental statement. In consideration of our need for all available information from the parties we conclude that the motion for leave should be granted and that the surrebuttal statement tendered on December 8, 1972, should be, and it is hereby accepted for filing in this proceeding.

*Jurisdictional issue.*—In their motion to dismiss the [sic], the railroads refer to the fact that section 405 of the Act (P.L. 91-518) provided that labor protective arrangements were to be a part of any contract entered into between a railroad and Amtrak relieving such railroad of all obligations to provide intercity rail passenger service. Such protective provisions were required to be certified by the Secretary of Labor as adequately protecting the rights of all affected employees. The subsequently executed contract was so certified on April 16, 1971. The contract provisions did not cover the right of employees to free or reduced fare transportation. On April 30,

1971, the railroads had in effect arrangements under which free or reduced fare transportation was provided to eligible employees. The railroads argue that the existence of these voluntary arrangements is sought to be made the basis for the imposition upon the railroads, both Amtrak and non-Amtrak, of new obligations contrary to the provisions of the existing contracts with Amtrak and contrary to the provisions of Public Law 91-518. Under section 405(f) of the act (Public Law 92-316), we are required to determine an amount to be paid over to Amtrak which would be an additional liability and therefore an imposition of an unconstitutional liability contrary to the provisions of the Fifth and Fourteenth Amendments.

The issue of whether the statute violates the Constitution is obviously not one for our determination. See *Public Utilities Commission v. United States*, 355 U.S. 534, 539-540 (1958). Moreover, in furtherance of its enumerated powers such as the power to regulate interstate commerce, Congress may affect or even "impair" existing contractual arrangements. See, e.g., *El Paso v. Simmons*, 379 U.S. 497 (1965); *FHA v. The Darlington, Inc.*, 358 U.S. 84 (1958); *Lichter v. United States*, 334 U.S. 742 (1948); *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940); and *Norman v. Baltimore & Ohio, R.R. Co.*, 294 U.S. 249 (1935). The motion to dismiss, therefore, is denied.

*Amtrak's position.*—Amtrak urges that, by section 405 (f), it is obligated to provide a service for railroad employees which was previously an exclusive obligation of the railroads, and what was previously voluntary has been made a matter of right on a space available basis. The reimbursement to be paid by the railroads is for "such costs as may be incurred". The traveling public and the taxpayers, to the extent that they underwrite Amtrak's deficits, are to bear no part of the cost of providing such free transportation. Amtrak asserts that



this proceeding essentially involves ratemaking principles, and that the basis for reimbursement cannot be less than a "cost-compensatory" rate as that term is used in ICC rate proceedings. It is claimed that to meet the standard of being compensatory, the costs contemplated by Section 405(f) must, as a minimum, cover the long-run variable cost of providing this obligatory transportation service, since such obligation is of a long-term duration for costing purposes and they include a substantial number of eligibles. However, Amtrak further contends that since pass riders will represent 20% of revenue passenger miles, fully-allocated costs would be the most appropriate basis for determining the required cost reimbursement. The fully allocated cost has been determined by Amtrak to be 8.6¢ per passenger-mile, based on its operations from May to December 1971 (See Appendix A). The cost of 8.6¢ per passenger-mile was computed by dividing the total passenger miles into railway operating expenses, reduced by revenues from non-passenger carrying activities (mail, express, etc.) and from passenger carrying activities not covered by pass privileges (sleeping cars, etc.). The calculation is set forth in Appendix A hereto.

In arriving at the above proposed fully-allocated cost, Amtrak argues that the space available criterion can not be used with respect to the 57.6 percent of the seat miles which are on a non-reserved basis (See Appendix C). It alleges that maintaining control of the non-reserved seat miles would entail prohibitive cost in that the trains stop at many terminals which are not constructed to permit gate control type of screening similar to the airlines. Amtrak further argues that although the airlines use a strict space available criterion, including a "bumping" procedure, it should be noted that the airlines operate many flights to few terminals almost entirely on a reserved basis. In contrast, control over the use of the non-reserved seats on a strict space-available basis on passenger trains would, according to Amtrak, require personnel stationed

at each car at each stop to bump pass riders to make room for revenue passengers. Amtrak estimates this cost of implementation to be approximately $42.1 million per year, which, pursuant to section 405(f) would be completely reimbursable by the railroads as a cost incurred in implementing or administering the statute.

A space available procedure has been included by Amtrak in its interim procedures for pass riders to the extent deemed possible. (See appendix B). The procedure permits pass riders to make advance reservations only within 24 hours of scheduled train departure. In addition, provision is made for the issuance of a monthly Space Availability Status Report identifying those trains in which no space is available for pass riders. However, these procedures do allow for the making of advance reservations on such peak trains within four hours of scheduled train departure. Amtrak asserts that while these procedures restrict the degree to which pass riders compete for available reserved space, they meet the requirements of the statute.

*Railroads' Position.*—The railroads assert that Amtrak's costs reimbursement will be insubstantial considering (1) the space-available limitation imposed upon the free or reduced-rate transportation and (2) the offsetting revenues obtained by Amtrak from the reduced rates and from the purchase by the pass riders of meals and other services. The railroads contend that the plain language of the statute entitles eligible employees to free or a reduced-rate transportation only "provided space is available" after other passengers have been accommodated; and that the transportation costs, if any, for which Amtrak is to be reimbursed are only those added costs incurred solely as a result of eligible employees occupying available space that otherwise would have been empty, after being offset by the reduced-rate and other revenues received by Amtrak from such passengers. The railroads estimate those costs, prior to being offset by Amtrak revenues, amount to .867 mills per passenger-mile. (See Appendix F), and are zero after being offset by reduced-rate revenues.



In supporting the reasonableness of the less than 1 mill per passenger mile figure, the railroads have included evidence of the pass charges for space available coach travel of four major domestic airlines, who comprise over 60 percent of the domestic airline industry. The charge per passenger mile varies from 2.02 mills to 7.6 mills. These costs include food which would not be provided to railroad pass riders. Deducting the charge for food leaves a net charge for air coach space available pass riders of 2.9 mills per passenger mile for a New York-Cleveland trip and 0.7 mills for a New York-San Francisco trip. (See appendix H).

The railroads assert that Amtrak is attempting to ignore the space-available limitation in the statute, and to obtain this Commission's aid in charging the railroads twice as much as its revenue pasengers pay for transportation on Amtrak trains, i.e., 4.6¢ per revenue passenger-mile, (appendix E) compared to the fully allocated cost of 8.6¢ per passenger-mile (appendix A). The railroads contend that the Congress, in imposing a space available limitation, intended it to mean that such traffic would be accommodated only if unused space is available after other traffic has been accommodated; that the legislative history shows that the Congress did not contemplate that the cost incurred, if any, would be substantial; nor was it intended that such costs were to be determined on a fully allocated cost basis, or a long-term variable cost basis, or any other basis utilized in fixing rates for common-carrier transportation. The railroads argue that the instant proceeding does not concern rate-making; that the Congress did not direct this Commission to determine the rate to be charged by Amtrak; and that Amtrak's position that the amount of reimbursement should be fully allocated costs, since such costs cannot be less than

a cost-compensatory rate, as that term is used in rate proceeding, should not be accepted by this Commission.

The railroads assert that section 405(f) authorizes this Commission only to determine the amount to be paid by the railroads to Amtrak for such "costs as may be incurred" in transporting eligible employees free or at reduced rates, "provided space is available". If Amtrak wants the railroads to pay for the transportation of such employees without enforcing the space-available limitation, whether because of the impossibility of complying with that limitation or for some other reason, it should resort to the Congress rather than to this Commission. It is the contention of the railroads that the proposed policy of limiting the imposition of the space available limitation to reserved trains, without such imposition on non-reserved trains, does not meet the statutory requirements. The railroads also argue that Amtrak is in error in not providing for an off-set of revenues against the costs incurred in providing such transportation. They contend that an examination of the legislative history supports their argument. Senate Report No. 92-756, 2nd Session, on page 12, expressly states that such revenues are to be offset against the costs incurred.

With respect to the matter of identifying eligible employees, the railroads contend that the statute limits eligibility to those who were eligible on April 30, 1971, under a railroad policy in effect on that date. Amtrak's policy imposes the cutoff as to eligible persons in some instances in terms of employment on such date. The railroads assert that the fact that a person is employed by a railroad on April 30, 1971, is immaterial, if he was not also eligible on that date to receive free or reduced-rate transportation under a railroad policy.

*Position of Labor Unions.*—Both the CRU and the RLEA contend that this Commission's jurisdiction is limited to the determination of the amount to be reimbursed by the railroads for providing transportation to



pass riders. They contend that the railroads are in error in seeking to extend that jurisdiction to make a determination of the adequacy of the pass policy determined by Amtrak and the persons eligible thereunder.

*Discussion and Conclusion*

Pursuant to Section 405(f) of the Act we are entrusted with the difficult task of determining the amount Amtrak "shall be reimbursed by the railroads by way of payment or offset for such costs as may be incurred in providing transportation services to railroad employees . . . . including the costs of implementing and administering this section." Amtrak has been given the responsibility of providing free or reduced-rate transportation by railroad to any railroad employee eligible to receive such service on April 30, 1971, under the terms of any policy or agreement in effect on such date, "provided space is available." Amtrak has also been given the discretionary power of applying to all eligible railroad employees a pass policy consisting of "a single systemwide schedule of terms *determined by the Corporation* to reflect terms applicable to the majority of such employees under those policies or agreements in effect on April 30, 1971," (emphasis added). The language of the statute is explicit. Our sole jurisdiction is to determine "amount of any payment owed by the railroad" for Amtrak's provision of free or reduced-rate transportation to eligible employees, including the cost of implementation and administration.

We believe that Amtrak has effectively implemented the space-available criterion with respect to the occupancy, by pass riders, of the 42.4% of its seat miles operated on a reserved basis. Generally, competition for such space by pass riders with full revenue riders has been substantially restricted by Amtrak's 24- and 4-hour reservation policy. Adequate measures have been taken to give priority to full revenue passengers in availing themselves of reserved space. Although some revenue may be

lost if pass riders obtaining late-hour reservations "block" potential full revenue passengers, those pass riders would provide some offsetting revenue in the form of reduced-rate fares, sleeping car charges, dining car charges, and charges for other services. Revenues of that kind will be made available to Amtrak through utilization by pass riders of otherwise empty space.

As to the space available criterion with respect to the 57.6% non-reserved seat miles operated, we are convinced that Amtrak has no truly effective way of applying it. There is no suggestion in the record as to how the space available limitation can be enforced on these non-reserved trains, short of excluding pass riders from using them. In consideration of this situation, we are of the opinion that the monthly report of space availability should include those non-reserved trains or sections on which pass riders are not allowed. Implementation of this exclusionary feature in the pass policy issued by Amtrak will result in their effectively meeting the space availability proviso of section 405(f).

It is noted that in a proceeding before the Civil Aeronautics Board it was found that discount fares generated a need for more capacity and its related costs. However, the case concerned the continuation of a promotional pricing technique which could unnecessarily burden the general fare level. This situation is not similar to our consideration of costs related to employee pass riders but rather to excursion trips promoted by Amtrak or non-Amtrak railroads. Our proceeding does not concern the generation of additional revenue passengers by use of discount fares. See: Civil Aeronautics Board Docket 21866-5, *Domestic Passenger-Fare Investigation*, Decided December 5, 1972.

We have no doubt that, aside from the costs of implementation and administration of a pass policy, Amtrak will incur some added transportation costs. A determination of these costs prospectively, without actual ridership figures for a period of time, unquestionably is not wholly reliable. The degree of utilization of these services by the free or reduced rate riders is an important factor that must be considered in the determination of the amount of cost reimbursement. We cannot accept, at this time, Amtrak's projection that pass riders will represent 20 percent of revenue passenger miles. Not only do we not have actual ridership figures for a sufficient period of time to make a judgment, but this projection assumes a constant level of revenue ridership. It ignores the fact that revenue ridership will of necessity be subject to fluctuation as Amtrak adds and substitutes services. It also ignores the fact that the eligible employees have been determined by the cut off date of April 30, 1971, and will only decrease, as time passes, through attrition. We cannot assume that added services will be provided for the sole benefit of pass riders. Services are operated for the benefit of revenue riders, and the carriage of pass riders is incidental thereto. In addition, we cannot accept the argument that all of the expenses will vary with the addition of an, as yet, unknown, number of pass riders. Admittedly, some expenses are directly affected by volume, e.g., those associated with tickets, baggage checks, and on-train and station supplies, but others may not be so affected.



We cannot accept the railroads' argument that the increase in passenger volume, no matter how small, will contribute additional revenue without any related expense. Nor can we agree with their contention that the availability of space should be determined for railroads in a manner similar to that used by the airlines. The two modes have significantly different operating characteristics. We do believe, as stated previously, that it is possible for Amtrak to exclude free and reduced-rate pass riders from heavily-used trains when other services are available over the same route, as they have done with

respect to the New York-Washington Metroliners and the New York-Boston Turbotrains.

As stated, a determination of prospective costs, without data derived from the experience of actual operations, is not as reliable as is ordinarily desirable. Nevertheless, considering the time limitation imposed by the statute, it is here unavoidable. While the statute makes no specific provision for modification of the decision required to be made, as does section 16(6) of the Interstate Commerce Act with respect to other orders issued by the Commission, since we are empowered to make a decision "binding on both parties," it is a reasonable assumption that we have the derivative power to modify that decision upon an augmented record, based on changed circumstances or the availability of more reliable data.

Accordingly, at this time we shall approve an interim payment of 0.79 of a mill per passenger-mile which is the resultant mean between the May and August 1972 cost elements (Appendix F and G), and which will represent interim compensation to Amtrak for the minimal variable costs incurred in providing transportation services to eligible railroad employees on a space available basis, with the revenue generated by the reduced-rate fare offset against such amount. This rate of payment will not unduly burden the railroads making such payments, and will encourage Amtrak to enforce the space available provision to the maximum extent possible. We shall also provide that such payment shall be redetermined after the pass policy is in operation for a period of at least twelve months. The proceeding will be held open, and at the end of that period, Amtrak and the railroads shall submit the information requested in Appendix D hereto; and the matter will then be further considered, with the possibility of retroactive adjustments.

We find that the interim amount of cost reimbursement, as set forth above, provides a just and reasonable



basis for deciding, for the time being, the issues raised by the record as presented, but that they should be observed by the parties, subject to the submission of the data required by Appendix D hereto, and to possible adjustment in the future, perhaps with an effect retroactive to the date of this decision.

An appropriate order will be entered.

[Appendices A through H omitted in printing]

**ORDER**

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D.C., on the 18th day of December, 1972.

Finance Docket No. 27194

DETERMINATION OF COST REIMBURSEMENT UNDER SECTION 405(f) OF THE RAIL PASSENGER SERVICE ACT, AS AMENDED

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

*It is ordered*, That National Railroad Passenger Corporation shall charge all railroads at an interim amount of 0.79 of a mill per passenger mile subject to offset by revenue derived from reduced-rate fares for providing transportation services to eligible railroad employees pursuant to section 405(f) of the Rail Passenger Service Act as amended.

*It is further ordered*, That National Railroad Passenger Corporation and all affected railroads shall submit the information required in Appendix D for a period of twelve months of operation of the pass policy to aid this Commission in the determination of a just and reasonable cost reimbursement payment for transportation service and administration;

*And it is further ordered*, That this proceeding otherwise shall remain open for the receipt of the data referred to next above, and for further proceeding thereafter to be determined.

By the Commission, Division 3.

ROBERT L. OSWALD
Secretary

[SEAL]



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted in Printing]

**DEFENDANT NATIONAL RAILROAD PASSENGER CORPORATION'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Defendant National Railroad Passenger Corporation ("Amtrak"), through its undersigned counsel, hereby moves this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure for Summary Judgment in its favor on all counts of Plaintiffs' Complaint.

In support of defendant's motion, the Court is respectfully referred to defendant Amtrak's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment and the exhibits attached hereto.

[Signatures Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted in Printing]

**AFFIDAVIT OF ROGER LEWIS**

Roger Lewis, being first duly sworn, deposes and says as follows:

1. On May 1, 1971, I became the first President and Chairman of the Board of the National Railroad Passenger Corporation ("Amtrak"). I served as President until February 28, 1975 and Chairman through July 30, 1975.

2. At the time Amtrak was created, it was estimated that between 1,400,000 to 2,000,000 rail travel passes had been issued by the railroads and were still outstanding.

3. In order to reduce the cost to Amtrak of the large number of outstanding passes and because there was no obligation for Amtrak to continue the pass policies of the railroads, Amtrak decided that pass privileges should be confined to employees of the railroads which operated trains on behalf of Amtrak. These privileges were limited to half-rate fares; causing the elimination of all free transportation. Employees of other railroads lost all pass privileges. Letter No. 10, April 23, 1971, Exh. 4.

4. The railroads protested Amtrak's drastic curtailment of the pass privileges which the railroads had previously given to their employees.

5. As recorded in the minutes of the June 24, 1971 and July 29, 1971 meetings of the Amtrak Board of Directors (Exhs. 5, 6), the railroads represented to Amtrak that the withdrawal of free transportation privileges for their employees threatened to produce severe labor problems for them. Specifically, their concerns were about the deterioration of employee morale and the possibility of strikes if the privileges were not restored.



6. The reference in the June 24, 1971 minutes to the "status of litigation" relating to rail passes refers to the fact that employees of the Penn Central Transportation Company had threatened a strike if their pass privileges were not reinstated.

7. In urging Amtrak to restore pass privileges, the railroads argued that the withdrawal of the privileges interfered with the expectations of the railroads' employees. Some railroads asserted that the withdrawal of these rights was an act of bad faith. This sentiment also was echoed by the labor representative, Charles Luna, on the Amtrak Board.

8. The Association of American Railroads, the railroad's trade association, wrote Amtrak Board member General Frank S. Besson on the matter of pass privileges and pointed out that:

> Railroad employees have attached great importance to pass privileges. They have considered them part of their employment privileges and as a fringe benefit and reward for service.

Exh. 7.

Further affiant sayeth not.

/s/ Roger Lewis
ROGER LEWIS

SUBSCRIBED and SWORN

BEFORE ME THIS 5th DAY OF NOVEMBER, 1981.

/s/ Anita L. Martin
Notary Public
My Commission Expires July 31, 1984

[Exhibit 3 to the affidavit of Roger Lewis filed in support of Defendant's Cross-Motion for Summary Judgment]

BY THE COMPTROLLER GENERAL

**REPORT TO THE CONGRESS**

OF THE UNITED STATES

## HOW MUCH SHOULD AMTRAK BE REIMBURSED FOR RAILROAD EMPLOYEES USING PASSES TO RIDE ITS TRAINS?

The Amtrak Reoganization Act of 1979 required GAO to study the free or reduced rate transportation Amtrak provides to railroad and terminal company employees, retirees, and their spouses and dependents under the Rail Passenger Service Act. The act also required GAO to recommend the appropriate means to reimburse Amtrak for its costs to provide the transportation.

As of December 1979, about 1 million people were eligible. During 1979 they used Amtrak-issued passes to make 384,000 trips and travel 140 million miles.

GAO concludes that the costs Amtrak incurs to furnish transportation to pass riders are debatable, and the Congress must decide for which costs Amtrak should be reimbursed.

[GAO SEAL]

CED-80-83
MARCH 28, 1980



[SEAL]

COMPTROLLER GENERAL OF THE
UNITED STATES
Washington, D.C. 20548

B-196907

To the President of the Senate and the
Speaker of the House of Representatives

This report concerns the free and reduced rate transportation Amtrak provides to railroad employees and retirees and their spouses and dependents under the Rail Passenger Service Act (45 U.S.C. 565(f)). The report describes the program's background and discusses its costs and benefits, the value of the service provided, and the reimbursement to Amtrak.

The Amtrak Reorganization Act of 1979—Public Law 96-73, Section 120(b)—required us to conduct the study and report the results to the Congress and the Interstate Commerce Commission. Our report was to include recommendations for reimbursing Amtrak for the free and reduced rate transportation.

Amtrak's costs to provide transportation to pass riders are debatable, and we did not find adequate analytical evidence to support one position over another or to recommend a specific means to reimburse Amtrak. We conclude that the matter requires a policy decision by the Congress and suggest alternatives regarding how much Amtrak should be reimbursed for pass rider travel.

We are sending copies of this report to the Chairman, Interstate Commerce Commission; the Director, Office of Management and Budget; the Secretary of Transportation; the president of Amtrak; and the chairmen of the congressional committees concerned with railroad passenger service.

/s/ Elmer B. Staats
Comptroller General
of the United States

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DIGEST [omitted in printing]

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ABBREVIATIONS

| | |
|---|---|
| Amtrak | National Railroad Passenger Corporation |
| GAO | General Accounting Office |
| ICC | Interstate Commerce Commission |

# CHAPTER 1

## INTRODUCTION

The Amtrak Reorganization Act of 1979 (Public Law 96-73) requires us to study the free and reduced rate transportation provided railroad employees by the National Railroad Passenger Corporation (Amtrak) under section 405(f) of the Rail Passenger Service Act.[1] We are to report the results to the Congress and the Interstate Commerce Commission (ICC) with recommendations for the means to reimburse Amtrak for the cost of providing the transportation, taking into account the service's value. In addition to responding to the act, this report includes data on railroad employees who are not eligible under the Rail Passenger Service Act but have been extended reduced rate travel privileges by Amtrak.

The Rail Passenger Service Act, as amended, gives certain railroad and terminal company employees and retirees, along with their spouses and dependents, the right to free or reduced rate personal travel on Amtrak, if space is available. Widows of certain eligible employees and retirees have also been extended these privileges. The act covers railroad and terminal company employees and retirees (hereafter referred to as railroad employees unless otherwise noted) who had similar privileges on April 30, 1971, the date before Amtrak assumed rail passenger service from the railroads. As of December 26, 1979, about 1 million people were eligible under the act. During 1979 they used Amtrak-issued passes to make about 384,000 trips and travel about 140 million miles. These travelers are referred to as Public Law 92-316 pass riders after the 1972 amendment to the Rail Passenger Service Act that established the benefits.

For the most part, public law pass riders ride free on their home rail lines; that is, the lines of the particular

[1] 45 U.S.C. 565(f).



railroad with which they are or were associated. They travel on the rest of Amtrak's system at half fare.

Amtrak also provides, on its own accord, similar reduced rate transportation privileges to employees of the 16 participating railroads and 13 terminal companies[2] which are not eligible under the Rail Passenger Service Act. These employees and their spouses and dependents can travel at half fare on Amtrak's entire system. They numbered about 171,000 as of December 26, 1979, and are known as non-public-law pass riders when they ride the train. About 87,000 non-public-law pass riders traveled about 21 million miles on Amtrak in 1979. According to Amtrak representatives, these employees were extended reduced rate transportation privileges in 1972 in order to promote ridership, increase revenue, obtain the employees' good will, and meet railroad union requests.

During 1979, public law and non-public-law pass riders totaled 471,000, or about 2.2 percent of Amtrak's ridership. They traveled about 161 million miles.

## RAILROAD EMPLOYEES HAVE TRADITIONALLY RIDDEN TRAINS FREE OR AT REDUCED RATES

Railroad employees have been riding passenger trains free or at reduced rates since the 1880s. Before Amtrak took over, the railroads usually allowed all or certain of their employees to travel on their home lines free or at reduced rates. Many railroads also had reciprocal agreements permitting the others' employees to travel at reduced rates, usually half fare. In addition, employees of some freight-only railroads were allowed to ride at reduced rates on passenger service railroads. The terminal companies were also usually included in the pass programs. The railroad pass programs, however, often varied to some extent with regard to eligibility, restrictions, controls, and reciprocal agreements.

[2] The railroads and terminal companies with which Amtrak contracts to operate and maintain its trains.

The railroads and their employees generally considered pass privileges as a gratuity from employer to employee, and the privileges usually were not required by union agreements. The railroads viewed the costs to provide free or reduced rate transportation as insignificant because seats occupied by pass riders would normally have been empty. They did not reimburse each other for pass riders under the reciprocal agreements. (Amtrak pointed out, however, that it does not receive reciprocal benefits from the railroads because it is the sole intercity passenger railroad.)

### *MANY RAILROAD EMPLOYEES LOST THEIR PASS PRIVILEGES WHEN AMTRAK BEGAN OPERATING*

The Rail Passenger Service Act was enacted in October 1970, creating Amtrak as a for-profit corporation to revive the failing intercity passenger train industry and retain a high-quality rail passenger service for the Nation. Amtrak began operations on May 1, 1971, and assumed passenger service from all but five railroads.[1] With Amtrak's takeover of passenger service, many railroad employees lost their free and reduced rate transportation privileges.

In early 1972 Amtrak gave free or reduced rate transportation privileges to participating railroad and terminal company employees and retirees. These priviliges, however, were subject to change or cancellation by Amtrak, and privileges for many railroad employees and retirees were not restored.

### *PASS PRIVILEGES REESTABLISHED BY LEGISLATION*

On June 22, 1972, the Rail Passenger Service Act was amended by Public Law 92-316 to restore free or reduced

[1] The Southern; the Denver and Rio Grande Western; the Chicago, Rock Island and Pacific; the Georgia; and the Canadian Pacific railroads declined to join Amtrak.



rate transportation to all who had such privileges when Amtrak took over rail passenger service. Specifically, the amendment required Amtrak to assure that, to the maximum extent practicable, railroad and terminal company employees, retirees, and their spouses and dependents eligible for free or reduced rate transportation on April 30, 1971, would be eligible to receive, provided space was available, free or reduced rate transportation on any intercity rail passenger service provided by Amtrak on terms similar to those available to them on that date. Amtrak had the authority to adopt the terms of the various railroads or a single systemwide schedule of terms. Amtrak chose the latter. (See p. 6 [page 52 of this Joint Appendix].)

### *REIMBURSEMENT TO AMTRAK FOR THE PASS PROGRAM*

The amendment also provided that the railroads were to reimburse Amtrak for the costs incurred in providing the required free and reduced rate travel, including the cost of implementing and administering the program. Within 90 days each railroad was to enter into a reimbursement agreement with Amtrak. If Amtrak and a railroad could not agree on the railroad's payment, ICC was to decide the payment amount within 90 days after referral. Amtrak and the railroads substantially differed on what the reimbursement should be, and referred the matter to ICC for a decision.

#### *The ICC reimbursement decision*

During the ICC deliberations, Amtrak proposed to charge the railroads 8.6 cents per passenger-mile.[1] This amount equaled Amtrak's operating expenses per passenger-mile after being reduced by revenues from non-passenger-carrying activities (mail, express, etc.) and from passenger-carrying activities not covered by pass privileges (sleeping cars, etc.).

[1] A passenger-mile is the term for carrying one passenger one mile.

The railroads estimated that the payment should be 0.867 mill (0.0867 of a cent) per passenger-mile and that this amount should be offset by the reduced rate fares paid by the pass riders. The railroads, however, agreed to pay Amtrak for the pass program's administrative costs.

The railroads contended that Amtrak's costs would be insubstantial. They said that the plain language of the legislation entitles eligible persons to free or reduced rate transportation "provided space is available" after other passengers have been accommodated. The railroads further said that the transportation costs, if any, for which Amtrak was to be reimbursed are only incremental costs, or those added costs incurred solely because of eligible persons occupying available space that otherwise would have been empty, and are to be offset by pass rider-generated revenue. The railroads concluded that Amtrak's proposed rate was ignoring the space available limitation and was charging for pass riders at twice the rate of a regular passenger.

Amtrak stated that the space available criterion could not be used for nonreserved trains, which accounted for about 58 percent of Amtrak's seat-miles.[2] According to Amtrak, the cost of maintaining control over space would be prohibitive, about $42 million per year, and these costs would be reimbursable by the railroads as a cost incurred to implement or administer the legislation.

In December 1972 ICC said it had no doubt that, aside from the costs to implement and administer a pass policy, Amtrak would incur some added transportation costs. ICC concluded, however, that Amtrak's passenger services are operated for the benefit of revenue riders; carrying pass riders is incidental. ICC said it could not assume that added services would be provided for the sole benefit of pass riders and that expenses would vary with the addition of an as yet unknown number of pass riders.

[2] A seat-mile is the term for moving one train seat one mile.



ICC approved an interim reimbursement rate of 0.79 mill per passenger-mile to compensate Amtrak for transporting the pass riders in available space. The 0.79 mill was to be offset by any reduced rate fares paid by pass riders.

As a result of the ICC decision, the railroads reimbursed Amtrak solely for the pass program's administrative costs. The railroads paid nothing for incremental operating costs because the 0.79 mill per passenger-mile was always offset by the pass riders' half fares. ICC left the case open so that the rate could be reconsidered at a future date, but Amtrak was unable to identify and document incremental costs that would exceed the pass riders' half fares.

*The 1979 Amtrak Reorganization Act*

The Reorganization Act, enacted on September 29, 1979,[1] superseded the ICC decision for the 2-year period beginning October 1, 1979, and required the railroads to reimburse Amtrak for public law pass riders at the rate of 25 percent of the systemwide average monthly yield per passenger-mile during the 2 year period. Amtrak has defined the systemwide average yield as its average revenue from all ticket sales (except commuter tickets and free or reduced rate pass rider tickets) on all of Amtrak's system. The 25-percent reimbursement rate is in lieu of any charges to the railroads for costs incurred by Amtrak to provide the free or reduced rate transportation, and it is not to be offset by the pass riders' half fares.

Based on the new rate, Amtrak is charging the railroads about $820,000 for October, November, and December 1979. This amount was more than the railroads paid Amtrak in all of 1978.

Before the Reorganization Act, the railroads reimbursed Amtrak at the same rate for the public law and

[1] The Amtrak Reorganization Act's effective date is Oct. 1, 1979.

non-public-law pass riders. Amtrak and the railroads did not distinguish between the two groups. However, the 25-percent reimbursement rate established by the Reorganization Act applies only to public law pass riders. Amtrak and the railroads have not agreed on how much the railroads will pay for non-public-law pass riders. Amtrak wanted to apply the 25-percent rate to both, but the railroads were unwilling to pay for the non-public-law pass riders. Amtrak has continued the benefits but has not charged the railroads. Both Amtrak and the railroads anticipate difficulties with the railroad unions if the non-public-law privileges are discontinued.

## *HOW THE PASS PROGRAM WORKS*

Railroad employees, retirees, their spouses, and dependents eligible under the Rail Passenger Service Act are entitled to free or half fare coach transportation on all Amtrak intercity trains except the metroliners. Widows of employees who had 19 years or more service on April 30, 1971, or were retired on that date are also eligible. Pass riders can also upgrade to slumbercoach and sleeping accommodations by paying 50 percent of the regular additional charge for these services. Half fare coach tickets are assessed at one-half the standard one-way fare, excluding all discounts other than children's fares.

Pass riders are eligible for travel on a space available basis; that is, pass riders only take a space on the trains if that space would normally go empty. Currently, Amtrak does not allow pass riders to make reservations more than 24 hours before scheduled train departure times, and they cannot ride the metroliners. However, much of Amtrak's space is unreserved. (See ch. 4 for a further discussion of the space availability criteria.)

Amtrak issues plastic, embossed cards to eligible employees, retirees, and widows. These cards also contain the names of their spouses and dependents. Pass riders submit these cards to authorized ticket agents in order to



obtain tickets. Tickets must be picked up and signed for in person. The pass rider's signature is also required by the conductor/trainman on the train.

As shown by the following table, pass riders' entitlement to free or reduced rate travel depends on length of service on April 30, 1971, whether or not they are retired, and whether they are traveling on or off home lines.

SCHEDULE OF PRIVILEGES

| | Unlimited free (note a) | Limited free (note b) | Half fare (note c) |
|---|---|---|---|
| *Participating* railroad and terminal company *employees* with *19* or more years of continuous service on April 30, 1971, and their: | x | | |
| Widows | x | | |
| Spouses | x | | |
| Dependents | | x | |
| *Participating* railroad and terminal company *employees* with *9 to 19* years of continuous service on April 30, 1971, and their: | x | | |
| Spouses | | x | |
| Dependents | | x | |
| *Participating* railroad and terminal company *employees* with *less than 9 years* of continuous service on April 30, 1971, and their: | | x | |
| Spouses | | | x |
| Dependents | | | x |
| *Retirees* who on April 30, 1971, were employed by or retired from a *participating* railroad or terminal company and their: | x | | |
| Widows | x | | |
| Spouses | x | | |
| Dependents | | x | |

| | Unlimited free (note a) | Limited free (note b) | Half fare (note c) |
|---|---|---|---|
| *Employees* and *retirees* of *nonparticipating* railroads and terminal companies who on April 30, 1971, were eligible for free or reduced rate transportation under a policy or agreement in effect with any participating railroad and their: | | | |
| Spouses | | | x |
| Dependents | | | x |
| | | | x |
| *Employees* who were hired after April 30, 1971, and are currently employed by *participating* railroads or terminal companies (non-public-law) and their: | | | |
| Spouses | | | x |
| Dependents | | | x |
| | | | x |

[a] Persons indicated are eligible for free transportation, unlimited as to frequency, on Amtrak trains over the lines of the participating railroad with which the employee or retiree is or was associated (home road or designated home road for terminal company employees and retirees) provided space is available. In addition, they are eligible for reduced rate transportation (one-half of the regular coach fare based on the one-way fare, excluding all discount and promotional fares except children's fares) off the home road to the extent that space is available.

[b] Persons indicated are eligible for free transportation (as defined above) but limited to 12 free round trips per calendar year. In addition, they are eligible for reduced rate transportation off the home road and on the home road after the 12 free trips, to the extent space is available.

[c] Persons indicated are eligible for Amtrak systemwide reduced rate transportation, to the extent space is available.



## *SCOPE OF STUDY*

We examined (1) the history and legislative background of the pass program, (2) Amtrak's pass policies and procedures, (3) eligibility and pass ridership trends, (4) the program's costs and benefits, including who benefits and how and who pays and how much, (5) how the service provided pass riders compares to that provided regular fare-paying passengers, and (6) how much Amtrak should receive for providing the service.

We reviewed Amtrak and ICC records and met with representatives of Amtrak, the Department of Transportation, ICC, the Association of American Railroads, the Air Transport Association, the National Association of Motor Bus Operators, and Greyhound Lines, Inc. We also met with six major railroad companies affected by the new reimbursement rate required by the Amtrak Reorganization Act. These were Consolidated Rail Corporation; Seaboard Coast Line Railroad; Southern Railway System; Burlington Northern, Inc.; Atchison, Topeka and Santa Fe Railroad; and the Chessie System. In addition, we talked to representatives of several railroad employee unions: the United Transportation Union; the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees; the International Brotherhood of Electrical Workers; Brotherhood of Locomotive Engineers; Brotherhood of Railroad Signalmen; Railway Labor Executives' Association; and Brotherhood of Maintenance of Way Employees.

We reviewed Amtrak data on pass eligibility, ridership, generated revenues, and costs. We also reviewed ICC's docket file on its 1972 reimbursement rate determination and the legislative history of the statutes establishing the pass program and the recent change in the reimbursement rate. Amtrak's internal audit reports on the effectiveness of its pass controls were also examined. The historical data on pre-Amtrak railroad employee pass

privileges was primarily obtained through the recollections of Amtrak, railroad, and union representatives and by review of the ICC docket file.

## CHAPTER 2

### *PASS ELIGIBILITY, RIDERSHIP, AND REVENUE*

In December 1979 over 1.2 million people were eligible for public law and non-public-law pass privileges and could ride Amtrak's trains at free or reduced rates. During 1979 they made about 471,000 trips and traveled 161 million miles. Public law pass riders contributed about $2.5 million in revenue. (Reliable revenue data was not available for non-public-law pass riders.) The number of eligible persons, pass riders, and miles traveled have declined substantially since the beginning of the program in 1972. Revenue has also declined but not as much because fares have increased.

### *THE NUMBER OF ELIGIBLE PERSONS IS DECLINING*

Amendment of the Rail Passenger Service Act in 1972 gave free or reduced rate transportation benefits to about 2.83 million people. There were only 1.05 million eligible in December 1979, a decrease of about 63 percent. The major cause of the decline was employee and retiree deaths. The chart on the next page shows how the number of persons eligible under the Rail Passenger Service Act decreased from December 1977 to December 1979.



| Type of passholder | Periods of comparison | | | | | |
|---|---|---|---|---|---|---|
| | As of 12-23-77 | | As of 12-8-78 | | As of 12-26-79 | |
| | Total persons eligible | Percentage | Total persons eligible | Percentage | Total persons eligible | Percentage |
| Participating railroad employees: | | | | | | |
| Employees with less than 9 yrs. of service on 4-30-71 | 187,084 | 16.8 | 190,671 | 17.9 | 179,435 | 17.2 |
| Employees with 9-19 yrs. of service on 4-30-71 | 142,753 | 12.8 | 144,185 | 13.6 | 133,250 | 12.7 |
| Employees with over 19 years of service on 4-30-71 | 294,951 | 26.4 | 287,463 | 27.0 | 239,531 | 22.9 |
| Widows of the above category employees | 227 | .1 | 237 | .1 | 252 | .1 |
| Employees on 4-30-71, since retired | 106,784 | 9.6 | 110,388 | 10.4 | 120,140 | 11.5 |
| Employees retiring on or before 4-30-71 | 148,232 | 13.3 | 107,334 | 10.0 | 94,880 | 9.1 |
| Widows of retirees | 53,252 | 4.8 | 47,066 | 4.4 | 46,876 | 4.5 |
| Participating terminal company employees | 17,177 | 1.5 | 16,946 | 1.6 | 16,217 | 1.6 |
| Nonparticipating railroad/terminal company employees | 162,757 | 14.6 | 160,071 | 15.0 | 215,006 | 20.6 |
| Total | 1,113,217[a] | 100.0 | 1,064,361 | 100.0 | 1,045,587[a] | 100.0 |

[a] Totals do not equal 100 percent because of rounding.

The number of eligible persons decreased 6.1 percent during the 2-year period, and the decrease is expected to continue. As shown in the chart, retirees and employees with the longest service on April 30, 1971, dominated the total number of eligible persons. Their number should decrease as people die and their children become adults and lose their "dependent" status.

In December 1979 about 435,000 participating railroad employees, retirees, their spouses, and dependents were eligible for unlimited free transportation on their home lines; about 251,000 were eligible for 12 free round trips per year; and the other 344,000 had reduced rate travel privileges. (All trips off the home lines and in excess of the 12 free round trips are at reduced rates.) Another 16,000 eligibles are associated with participating terminal companies. Many of these have free or limited-free home line transportation privileges, but Amtrak's statistics did not identify them separately. Eventually all public law eligibles, except those that are or were associated with nonparticipating railroads or terminal companies, will be eligible for at least limited-free transportation on their home lines, but the total number of eligibles will continue to decline.

The following chart shows that the number of non-public-law eligibles has increased 49 percent the last 2 years.

| | Number of persons eligible | Cumulative percent increase |
|---|---|---|
| 12/23/77 | 114,490 | — |
| 12/08/78 | 141,899 | 23.9 |
| 12/26/79 | 170,806 | 49.2 |

According to Amtrak's pass bureau chief, several possible factors account for the increase:

—The railroads have hired new employees to replace retirees and to meet additional staffing needs.



—Eligible employees have married.

—Family sizes have increased.

The 56,316 increase in non-public-law eligibles, however, has not been enough to offset the 67,630 decline in public law eligibles during the same period. Under present conditions, the total number of pass riders is also expected to continue to decrease.

*PASS RIDERSHIP*

Railroad pass riders made up about 2.2 percent of Amtrak's total ridership in 1979. Amtrak carried nearly 21.5 million people and over 471,000 were pass riders. Public law pass riders, who accounted for about 81 percent of the 1979 pass ridership, have been declining. Non-public-law ridership has grown rapidly but is still small compared to public law ridership.

In 1979 pass riders traveled about 161 million miles, a decline of about 66 million from 1976. Ridership should continue to decrease under present conditions, as the number of eligible persons declines.

The following table shows that public law pass ridership dropped substantially—about 37 percent—from 1976 to 1979.

Public Law Pass Ridership
Jan. 1976-Dec. 1979

| | 1976 | 1977 | 1978 | 1979 |
|---|---|---|---|---|
| Number of pass riders | 605,933 | 541,836 | 455,590 | 384,080 |
| Passenger-miles traveled (thousands) | 215,940 | 205,876 | 173,691 | 140,297 |
| Average trip length-miles (note a) | 356 | 380 | 381 | 365 |

[a] Computed by dividing passenger-miles traveled into number of riders.

Our analysis of Amtrak's ridership statistics indicated a recent substantial growth in the non-public-law pro-

gram. From 1976 to 1979, the number of non-public-law pass riders more than tripled from 28,413 to 87,238. The passenger-miles traveled almost doubled from 11.3 million to 20.9 million. However, the average trip length declined from 398 miles to 239 miles.

### *PASS RIDER-CONTRIBUTED REVENUE*

In 1979 Amtrak received about $2.5 million in revenue from public law pass riders. This amount was for reduced rate transportation charges, including upgraded accommodations. (Reliable revenue data for non-public-law pass riders was not available.) This amount was a slight decrease from the $2.9 million Amtrak collected in both 1978 and 1977. According to Amtrak's manager of passenger accounting, several fare increases probably contributed to a slower revenue decrease than the decrease in pass riders.

Public law pass riders yield substantially less revenue per passenger-mile than other intercity passengers. For example, the 1979 yield from regular passengers was $0.073 per passenger-mile. The yield for pass riders that year was only $0.018.

Pass riders pay the same as other passengers when they buy food, beverages, liquor, and tobacco. Amtrak did not separately identify how much pass riders spend for food and beverages and other items.

### *CONCLUSIONS*

Public law pass ridership has declined substantially and is expected to continue to decline as eligible railroad employees/retirees die and their dependents grow up. Under present conditions, pass riders will become a smaller and smaller percentage of Amtrak's total ridership, especially if overall ridership continues to go up. The number of non-public-law pass riders has increased but not as much as public law pass riders have decreased.



## *CHAPTER 3*

## *COSTS AND BENEFITS*

**Amtrak, the railroads, and the pass riders all benefit from and/or incur costs for the pass program, but we were unable to determine how much because**

- **—many benefits are intangible or difficult to quantify;**
- **—benefits vary from pass rider to pass rider, from railroad to railroad, and from situation to situation; and**
- **—Amtrak's costs of providing transportation to pass riders are debatable.**

### *AMTRAK COSTS AND BENEFITS FOR IMPLEMENTING AND ADMINISTERING THE PASS PROGRAM*

#### *Costs*

How much it costs Amtrak to carry pass riders is debatable. A widely recognized transportation/economic view is that each passenger—whether a pass rider or not—should be assigned an equal share of the costs of operating a train. In other words, it should make no difference if passengers have first or second priority to board the train because they receive the same basic service on the train. These costs are referred to as fully allocated costs.

Another widely-recognized view is that pass riders travel in a seat or space that would otherwise go empty, and Amtrak incurs only a small additional or incremental cost to transport them. The incremental cost philosophy's basic premise is that providing rail passenger transportation requires large fixed costs, such as the costs for locomotives, cars, and right-of-way, which are incurred whether or not a particular train is full or has empty seats but that some added costs are incurred with each

additional passenger. Examples are fuel for the added weight, additional towels, etc., that may be used and wear on the seat, carpet, and so forth.

During the 1972 ICC reimbursement rate case, Amtrak contended that fully allocated costs would be the most appropriate basis for determining what the railroads should reimburse Amtrak. The railroads, however, argued and ICC agreed that only incremental costs should be considered because Amtrak would incur nearly all its costs without the pass riders. Today, Amtrak and the railroad still differ on what the costs should be.

*Fully allocated costs*

Although Amtrak has improved its cost/revenue ratio, its costs have substantially exceeded its revenues. Rail passenger service is expensive. In fiscal year 1979 Amtrak's operating costs amounted to about $998.1 million. Amtrak's fiscal year 1979 operating costs and revenue are shown below.

| | (000 omitted) | |
|---|---|---|
| **Revenue:** | | |
| Transportation | $321,563 | |
| Food and beverage | 26,707 | |
| Mail, express, etc. | 12,781 | |
| Other | 20,238 | $381,289 |
| **Direct expenses:** | | |
| Train/engine crews | $ 97,719 | |
| Train fuel and power | 58,215 | |
| Onboard service-labor | 60,953 | |
| Onboard service-supplies | 24,890 | |
| Other direct | 2,061 | 243,838 |
| **Common expenses (note a):** | | |
| Station services | $ 48,628 | |
| Transportation | 29,213 | |
| Locomotive maintenance | 53,158 | |
| Car maintenance | 158,489 | |
| Metroliner maintenance | 9,112 | |
| Track-related maintenance | 24,521 | |
| Facility-related maintenance | 23,817 | |
| Common facilities overhead | 111,384 | |
| Other common expenses | 97,467 | 555,789 |
| **Other railroad expenses:** | | |
| Contract avoidable expense | 3,458 | |
| Assumption of liability | 1,368 | |
| Allocated performance payments | 7,265 | 12,091 |
| **Operating support** | | 44,068 |
| **Depreciation, taxes, and insurance** | | 79,664 |
| **Corporate general and administrative** | | 15,209 |
| **Interest expenses** | | 31,372 |
| **Other expenses, including prior period adjustments** | | 16,106 |
| **Total expenses** | | 998,137 |
| **Net loss** | | $616,848 |

[a] Expenses at facilities serving more than one train.



When operating costs are fully allocated to each Amtrak passenger (including pass riders), they amount to about $46.77 per passenger, or 20.3 cents per passenger-mile traveled, during fiscal 1979. On the same basis, each passenger contributed about $17.87, or 7.8 cents per passenger-mile. The net loss per passenger was $28.90, or 12.5 cents per passenger-mile.

Since Amtrak began operations, its costs have substantially exceeded its revenues, and the differences have been made up by Federal subsidies. The Congress and the administration have expressed a desire that Amtrak reduce its need for subsidies. For example, the Amtrak Reorganization Act established an improved ratio of revenues to operating expenses as an Amtrak objective. Specific goals are for Amtrak to cover at least 44 percent of its operating expenses (excluding depreciation) with revenue by the end of fiscal 1982 and 50 percent by fiscal 1985.

Amtrak is responsible for recovering as much of its costs as practicable. Fully allocated costs, however, are probably not a realistic basis to determine how much Amtrak should receive for pass riders. Although costs are

an important consideration, Amtrak's fares for regular passengers are largely based on such factors as competition from other transportation modes and the nature of the particular market being served. As shown earlier, full fare passengers have been paying less than half of what it costs to transport them.

*Incremental costs*

Before Amtrak took over, the railroads used the incremental cost concept to justify allowing their own employees to ride free or at reduced rates and other railroad employees to ride at reduced rates, when space was available. Other transportation companies such as the airlines have also used this justification. The railroads believe these costs to be insubstantial. For example, during the 1972 reimbursement rate case, the railroads estimated that Amtrak's operating costs to provide transportation to pass riders would be less than one-tenth of a cent per passenger-mile and this would be offset by the pass riders' half fares. ICC provided for a smaller reimbursement rate. (See ch. 1.)

Amtrak has considered the ICC-established reimbursement rate to be too low even for incremental costs, but it has not been able to identify and adequately document incremental costs that would not be offset by the pass riders' half fares. The Congress has also expressed concern that the ICC rate did not adequately reimburse Amtrak. For much of the pass rider travel, Amtrak was not reimbursed at all for the transportation.

If the 0.79 mill rate had been in effect for all of calendar year 1979, the reimbursement would have been about $120,000. But this amount would have been offset by the $2.5 million in pass rider half fares. If the rate was updated for inflation, the reimbursement would have been about $270,000, still substantially less than the offsetting half fares.



The railroads did agree to reimburse Amtrak for the program's administrative costs. For example, in 1978 Amtrak collected $406,000 from the railroads. At the time the Reorganization Act was passed, Amtrak and the railroads were finalizing an agreement for the railroads to pay $610,000 in 1979 administrative costs.

*Benefits*

Amtrak benefits when it receives revenue from the pass program which it ordinarily would not have obtained. This is the case when a pass rider occupies and pays half fare for a seat that otherwise would have been empty. Pass riders also generate revenue when they use other services such as food and beverages, for which they pay the same as a regular passenger. Of course, much of the passenger-miles traveled by public law pass riders are by those that ride free, and very little revenue is generated.

On the other hand, Amtrak would lose revenue if pass riders ride free or at half fare when they would have been willing to pay the regular fare or if Amtrak could have offered a lesser discount and enticed more people to ride the train. Half fare pass riders pay one-half the cost of a one-way fare without any discounts, except for children's fares. These riders may not have paid full fares for their trips if they did not use their passes because discounted fares such as the 75-percent fare for the elderly and group and excursion fares would be available to them.

Amtrak further benefits when pass riders are employees of participating railroads and are involved in operating Amtrak trains. Free or reduced rate travel can promote good will and morale and allow these employees to see first hand the results of their efforts. In addition, Amtrak benefits when pass riders relate good experiences with train travel to others.

*RAILROADS*

Before the Reorganization Act, the railroads paid very little for the pass program. Their cost was almost totally Amtrak's administrative costs for the program plus a small amount of administrative costs of their own, such as certifying their employees' eligibility for the pass program. The Reorganization Act, however, substantially increased the railroads' costs. For example, if the 25 percent of average monthly systemwide yield rate were in effect for 1978, the railroads would have paid about $3 million rather than nearly $406,000 in administrative costs. Amtrak's billings to the railroads for the last 3 months of 1979, under the new rate, totaled about $820,000. Over half that amount was billed to Conrail, Burlington Northern, and the Santa Fe.

Railroad representatives—including several vice-presidents, attorneys and rail passenger operations officers—generally told us their companies benefit very little, if any, from the pass program. They further told us that pass privileges are not used in recruiting as an inducement for employment. According to the railroads, many employees seldom use their passes, if at all, nor do they value them very highly. The railroad representatives added that many of the public law pass riders no longer work for the railroads, and they feel no obligation to provide these past employees with free or reduced rate transportation on Amtrak.

The railroads do benefit to the extent that their employees value the passes and attribute them to their employers. Further, railroad employee unions also like to have the passes for their members, and the passes may improve the railroad-union relationship. But these intangible benefits are difficult, if not impossible, to quantify.

*PASS RIDERS*

There is no question that pass riders benefit from the pass program. They ride the trains free or at substantially reduced rates. The passes have certain restrictions, however, that reduce their value. Because of the restrictions and other discounts available, pass riders may at times decide to become regular passengers.



Eligible persons must use their passes to obtain full benefits. However, some may not use their passes but still value them because they have the opportunity to use them when the need arises.

Much of the travel by pass riders is free. In 1979 public law pass riders traveled about 140 million passenger-miles, of which about 66 million were free coach travel. An additional 12 million miles were traveled by pass riders who paid only half the additional charge over coach fare for upgraded accommodations. The base fare was free. Thus, about 56 percent of the passenger-miles traveled by public law pass riders were by those whose passes exempted them from paying the coach fare. Furthermore, some others traveled free for part of their trip, and paid half fare for the remainder. Amtrak records these riders the same as reduced rate pass riders and does not separately identify the free travel. Non-public-law pass riders rode 21 million passenger-miles during 1979 but all paid half fares. On page 21 [page 69 of this Joint Appendix] are two examples of how eligible persons can receive large discounts by using their passes.

Railroad employee union representatives—including several unions' legislative directors and two vice-presidents—told us that the pass privileges under the Rail Passenger Service Act are benefits that the railroads owe their employees. The representatives said the railroads have historically provided the benefits, and the employees earned the privileges by their years of service to the railroads.

*CONCLUSIONS*

There is no question that pass riders benefit from the pass program. The railroads benefit when their em-

ployees have a higher morale and better relationship with their employers because of the passes. Amtrak may benefit, but it is uncertain how much. The major questions are (1) how many pass riders would ride Amtrak as regular passengers and pay full fare if they did not have passes and (2) could other passengers be found who are willing to ride at a lesser discount.

Before the 1979 Amtrak Reorganization Act, the railroads paid Amtrak very little for the pass program, but the act substantially increases their contribution. Amtrak's costs to provide transportation to pass riders vary greatly depending on whether fully allocated or incremental costs are considered. The railroads believe Amtrak should be reimbursed only for minor incremental costs, and Amtrak has been unable to identify and adequately document incremental costs that would exceed the pass riders' half fares. Amtrak's fully allocated costs are much larger than what it has received from the railroads and pass riders for the service but are probably not a realistic basis to determine how much Amtrak should be reimbursed. The fares of regular passengers are not based on fully allocated costs but on the value of the service provided. Amtrak recovers less than half of its operating costs from its fares.



***Examples of How Railroad Pass riders Receive Substantial Savings From Free or Reduced Rate Transportation***

*Example A*

Husband and wife traveling from Chicago, Illinois, to San Francisco, California, and return, with upgrade accommodations to a one-bedroom.

| | Total ticket cost | Discount in dollars | Percentage discount |
|---|---|---|---|
| Railroad pass riders: | | | |
| Public law (Burlington Northern retiree) and spouse | $404 | $572 | 59 |
| Non-public-law employee and spouse (note a) | 488 | 488 | 50 |
| Regular Amtrak passengers: | | | |
| Standard fare | 976 | — | — |
| Family plan (note b) | 820 | 156 | 16 |
| Excursion fare plan (note c) | 790 | 186 | 19 |
| Elderly fare plan (note d) | 820 | 156 | 16 |

*Example B*

Husband and wife traveling from Washington, D.C., to Miami, Florida, and return, with upgrade accommodations to a one-bedroom.

| | Total ticket cost | Discount in dollars | Percentage discount |
|---|---|---|---|
| Railroad pass riders: | | | |
| Public law employee (Seaboard Coast Line) and spouse | $139 | $459 | 77 |
| Non-public-law employee and spouse | 300 | 298 | 50 |
| Regular Amtrak Passengers: | | | |
| Standard fare | 598 | — | — |
| Family plan | 504 | 94 | 16 |
| Excursion fare plan | 486 | 112 | 19 |
| Elderly fare plan | 504 | 94 | 16 |

[a] The non-public-law cost is the same as a public law pass rider traveling off home lines.

[b] Under this plan, the husband pays the standard fare and his wife only half fare. Travel dates are restricted on many routes.

[c] This fare is good for travel over a 40-day period. Departures are prohibited on certain dates.

[d] The elderly fare gives individuals aged 65 or over a straight 25-percent discount (except for accommodation upgrades), if their ticket is priced over $40.

## CHAPTER 4

## SPACE AVAILABILITY AND VALUE OF THE SERVICE

The Rail Passenger Service Act specifies that eligible railroad employees are to receive free or reduced rate transportation, provided space is available. Whether space is available and how Amtrak ensures that full fare passengers are accommodated first are the principal limitations on pass riders, and these limitations affect the value of the service they receive.

### AMTRAK PASS RESTRICTIONS

Amtrak has the responsibility to select and enforce pass restrictions that assure, to the extent practicable, that pass riders are provided transportation only after full fare passengers are accommodated. These restrictions, which are subject to change at Amtrak's discretion, apply to space availability on both reserved and unreserved accommodations.

On trains with reserved seats or sleeping accommodations, passengers must have advance reservations. For these trains, pass riders are restricted to a 24-hour period prior to train departure time during which they can make advance reservations. (The airlines usually do not allow standby passengers to make reservations.) Amtrak requires no advance reservations and generally does not restrict the pass rider's ability to board unreserved trains, which account for slightly over 50 percent of Amtrak's seat-miles. However, Amtrak policy does require pass riders to give up their seats to full fare passengers if the train fills its seat capacity.

Before a train's departure, there is normally no way to determine how many passengers will actually board the train or if the train will fill beyond its seat capacity. Amtrak's policy is not to oversell reserved seats, but



other factors, such as incorrectly written tickets or an equipment change, can lead to more passengers on board than seats for them to occupy. When more passengers board a train than seats are available, the excess passengers are not put off the train, as would happen on the airlines. The passengers ride standing until space becomes available or they reach their destination.

Pass riders are informed that, as a condition of their passes, they may have to give up their seats or accommodations if such conditions arise. Train conductors are responsible for enforcing these regulations on board by instructing pass riders to stand or move out of upgraded accommodations. Amtrak's ridership and train capacity data indicates the number of standees but does not identify the passengers who had to stand when a train was filled over its seating capacity. Thus, we were unable to determine whether conductors are always enforcing the restriction.

Pass riders also are not put off the train at later points to make room for full fare passengers who may want to board the train. Amtrak's policy is not to bump pass riders because it may place an undue hardship on them. Trains often are not as frequent as air service, and some towns may have train service only once a day or every 2 days. Furthermore, trains often arrive at late hours, and pass riders would be bumped without hotel accommodations. However, conductors are supposed to remove pass riders from sleeping accommodations if full fare passengers want them.

In the past Amtrak has restricted pass riders from certain trains. Presently, they are exempted from the metroliner service.

The pre-Amtrak railroad employee pass program was also considered to be on a space-available basis, but the controls were not strictly standby. The major means to enforce space availability was to restrict pass riders

from the popular and heavily traveled trains. Amtrak estimated in 1972 that controls to ensure that travel is on a space-available basis would cost $42 million.

Amtrak has expressed concern that pass riders have required additional equipment to carry them and have taken the place of potential full revenue passengers. However, empty seats are usually available. If Amtrak is concerned about the effectiveness of its controls, it could take additional steps. For example, pass riders could be excluded from certain trains, or the 24-hour reservation limitation could be changed. In addition, pass riders could be eliminated from ridership and capacity data used in making decisions on equipment needs. More restrictions may be needed if Amtrak's ridership continues to increase.

## *SPACE AVAILABILITY*

Space availability, or whether pass riders can get seats on the trains they want, is a major factor in how valuable free or reduced rate transportation is to pass riders. Although pass riders may face some inconvenience and uncertainty, space is generally available over Amtrak's entire system.

### *Routes used by pass riders*

Pass riders, including Amtrak employees, comprise about 4 percent of total ridership. They are spread throughout Amtrak's system, but long-distance routes are the most popular in total numbers and percentage of pass riders to total passengers. Short-distance routes are the least popular. For example, in fiscal years 1977 and 1978 the percentages of pass riders to total passengers were as follows:



| | 1977 | 1978 |
|---|---|---|
| | (percent) | |
| Northeast corridor routes | 2.5 | 2.7 |
| Short-distance routes | 4.4 | 3.7 |
| Long-distance routes | 8.1 | 8.0 |

For Amtrak's 45 routes nationwide we developed pass ridership data for 6 months (every other month) in fiscal year 1979. Six routes had a 10-percent or higher pass ridership. All six were long-distance routes. Two other long-distance routes, a northeast corridor route, and a short-distance route had a pass ridership of over 8 percent.

The number of pass riders during fiscal years 1977 and 1978 was distributed as follows:

| | 1977 | 1978 |
|---|---|---|
| | (percent) | |
| Northeast corridor routes | 31 | 35 |
| Short-distance routes | 17 | 16 |
| Long-distance routes | 52 | 49 |

About half of all pass riders traveled the long-distance routes, and less than one in five rode the short-distance routes. In addition, a small number of routes carry a large percentage of pass riders. During our 6-month sample, we found that 10 routes—6 long-distance and 4 northeast corridor routes—had about 55 percent of all pass riders.

### *Long-distance trains*

Pass riders are in greatest evidence in terms of both numbers and percentages on long-distance routes, and these are the trains with the most pass restrictions. Space on most of these trains is all reserved. Long-distance trains are also scheduled less frequently, with some trains departing only 3 days per week. Even with these limitations, high levels of pass riders were able to get on the trains.

*Northeast corridor and short-distance trains*

Pass riders have a lesser impact on northeast corridor and short-haul routes. While the number of pass riders using northeast corridor trains is high overall, the number of trains on the corridor is greater and schedules more frequent than on long-distance routes. The few short-distance routes which carried high numbers of pass riders also had a higher number and frequency of trains running each day.

Reservation limitations are fewer on pass riders using northeast corridor and short-distance routes. Most trains on these routes were either totally unreserved or a combination of unreserved and reserved. Advance reservation restrictions do not apply to these trains.

*Space is usually available for pass riders*

In order to determine whether space is available for pass riders on individual trains, we analyzed the peak load statistics for a total of 72 trains on 18 routes. Many of these routes had high levels of total ridership. We found that long-distance and northeast corridor trains had the highest peak loads and would present the most problem for pass riders wanting to get on the train. However, as shown above, long-distance and northeast corridor routes are the most heavily traveled by pass riders. Pass riders want to ride the trains that other passengers do, and they are usually able to do so.

Amtrak maintains peak passenger load statistics which show ridership, including pass riders, at the most crowded points on train routes. Train capacity and ridership levels are counted at certain key points on the route and the percentage load factors are calculated. Amtrak records the peak or highest load factors on the train's route each day and then calculates the train's monthly average peak load. Since only the highest load



points along the route are included in the peak load statistics, an average load factor for all points on the route would probably be lower. Amtrak does not calculate an average load factor for a train's entire run.

From our sample of monthly peak load averages, Amtrak appears to have substantial capacity available, even on routes already carrying high levels of pass riders. Pass riders might encounter difficulty in getting reservations on some all-reserved, long-distance routes which have fewer trains and higher peak loads. Pass riders are entitled to reservations if space is available 24 hours before departure time. Even though a train may be reserved far in advance, Amtrak may cancel advance reservations if tickets are not picked up within a specified time before departure. Amtrak also may have "no shows" for a particular train, opening more opportunities for pass riders to obtain last minute space on all-reserved trains.

In our sample, several northeast corridor and short-distance trains with unreserved space had high peak loads. High peak loads usually present no barriers to pass riders getting on board unreserved trains, however, only in getting and keeping a seat. Pass riders generally have other less crowded trains on those same routes to choose from, if they want to minimize the possibility of not getting a seat or giving up their seat.

*Long-distance trains*

Reserved trains with high peak loads present the greatest problems for pass riders wanting to travel by train. In our sample, the all-reserved, long-distance trains came closest to this condition. However, even with high levels of pass riders, we found space was still available on most of the 14 long-distance routes we examined. Our analysis showed that during the sample months, only two long-distance routes had trains running regularly with very high peak load factors. These two routes had trains with

several monthly average peak loads over 90 percent and several daily peak loads over capacity. While these statistics show tight space availability at some points on the route, they include pass riders who were already boarded before the peak load point. The pass riders already on board would not be put off the train because it was over capacity.

The other 12 long-distance routes in our sample had only sporadic occurrences of full or overcapacity trains. None of the 34 trains in our 14-route sample had average monthly peak loads over 95 percent of capacity.

*Northeast corridor trains*

Most routes in the northeast corridor have pass rider percentages of under 3 percent. In terms of volume, however, they have some of the highest numbers of pass riders. High total ridership on corridor trains dilutes the pass rider's impact on route percentages.

In our sample of 20 trains on two corridor routes, we found 8 trains running consistently over capacity at peak load points. However, trains were running at other times on the same route at much lower peak loads. Thus, available capacity remained on the routes even though certain trains were running over capacity at peak times.

*Short-distance trains*

The 18 trains in our sample of two short-distance routes generally had lower peak loads than trains in our sample of northeast corridor and long-distance routes. Incidents of overcapacity loads were sporadic and limited to specific trains traveling at peak hours. As in the corridor, however, we found other trains with lower peak loads running next to these high peak load trains. The monthly average peak loads of all 18 short-distance trains in our sample were far below capacity. The highest monthly average peak load was 75 percent, and in many months it was below 50 percent.



## *VALUE OF THE SERVICE*

We believe that the value of the service Amtrak provides pass riders is an important factor in deciding what the reimbursement rate should be. However, we could not arrive at a definitive value of the service. The value of service provided regular passengers may be considered to be the amount they are willing to pay for it; that is, the price of the ticket. The value of the service to pass riders probably would be something less because of the restrictions placed on pass riders and the uncertainty about getting on the train they want. However, how much the value would be reduced could vary from pass rider to pass rider and from situation to situation. For example, many pass riders in the northeast corridor have several unreserved trains and more total trains available to them. Pass riders in other geographic locations may have access to a more limited number of trains. Also, some pass riders may care less about the 24-hour reservation limitation imposed on reserved trains. The availability of other transportation would also be a consideration.

Pass riders are receiving a better service under present restrictions than they would if strict standby controls were enforced. The purpose of the space availability criteria, however, is to ensure that pass riders do not increase costs by replacing full fare passengers or requiring additional equipment. We do not believe the purpose is to control the level of service to the pass rider. Furthermore, additional restrictions that may be needed in the future because of increased ridership would lower the value of the service to pass riders. Increased ridership would also reduce the amount of space on the trains, which would reduce the value of the service.

Although Amtrak and the railroads had not placed a specific value on the service to pass riders, Amtrak now receives half fares from all non-public-law pass riders and from public law riders traveling off their home lines.

In addition, Amtrak receives half fares from some pass riders when they travel on their home lines. Before Amtrak took over, the railroads also generally received half fares from other railroads' employees traveling on their lines. If Amtrak had received half fares for all pass rider travel in 1979, it would have received an additional $2.6 million.

## *CONCLUSIONS*

One measure of the passes' value is the service pass riders receive compared to regular fare passengers. Space availability and the restrictions Amtrak uses to ensure that full fare passengers have priority over pass riders are the major limitations on pass holders' use of the privileges.

On most trains space is available, and pass riders on those trains usually are treated the same as regular full fare passengers. However, Amtrak pass restrictions, such as the 24-hour reservation limitation and prohibition from metroliners, and some uncertainty about getting on desired trains reduce the value of the service to pass riders.

We were unable to quantify how the restrictions and uncertainty affect the value of service pass riders receive compared to full fare passengers. The value would vary by pass rider and by situation. Also, changes in space availability or pass restrictions could change the value. Although no specific value was placed on the service, a half fare has traditionally been the charge for railroad employees traveling off their home lines.



# *CHAPTER 5*

## *MATTERS FOR CONSIDERATION BY THE CONGRESS*

The 1972 amendment to the Rail Passenger Service Act that established the pass program also required the railroads to reimburse Amtrak for its costs to implement and administer the program. Amtrak and the railroads have differed substantially on which costs Amtrak should be reimbursed for ever since the program began, and the issue is still unresolved today.

Before Amtrak began operations, the railroads used the concept of incremental costs to justify providing free or reduced rate transportation to their own employees and reduced rate transportation under reciprocal agreements with other railroads. The railroads considered the incremental costs, or the additional costs to transport pass riders in seats that would otherwise go empty, to be minor. Furthermore, they received revenue from the reduced rate riders. The railroads believe that when the Rail Passenger Service Act required Amtrak to provide free or reduced rate travel to eligible railroad employees as the railroads had done, it also recognized the incremental cost of the service, and Amtrak should be reimbursed accordingly.

Amtrak believes it is responsible for recovering as much of its operating costs as practicable and should receive revenue or reimbursement in line with the value of the service it provides. Amtrak does not believe it is obligated to transport other railroads' employees while being reimbursed only for incremental costs, which are small compared to its fully allocated costs.

Amtrak was also unhappy with ICC's decision to allow incremental costs attributable to pass riders to be offset by other pass riders' half fares. The result was that the railroads generally paid nothing for transportation their

employees received, and Amtrak was not reimbursed at all for much of the travel by pass riders. For example, if the 1972 ICC rate of 0.079 cent per passenger-mile had been in effect for all of 1979, Amtrak's incremental costs would have been about $120,000, and this amount would have been completely offset by the $2.5 million in half fares paid by those pass riders who traveled off their home lines. On the other hand, Amtrak would have obtained an additional $2.6 million if it had received an amount equal to half fares for all pass rider travel in 1979.

We could not find adequate analytical evidence to establish whether Amtrak should be reimbursed for the value of the service it provides pass riders or for the incremental cost of providing the service. That choice is a policy decision that the Congress should make.

If the Congress chooses to have Amtrak reimbursed for the value of the service it provides, that value should probably be something less than the fare charged a regular passenger because pass riders are subject to restrictions and uncertainties that do not apply to full fare passengers. The railroads traditionally received (from the pass riders) one-half the standard fare for other railroads' employees, and Amtrak now receives half fare from all non-public-law pass riders and public law pass riders when they travel off their home lines. Amtrak also receives half fares from some pass riders when they travel on their home lines. However, there is no analytical basis to recommend half fare as the value of the service.

## *ALTERNATIVES FOR THE CONGRESS*

Congressional action will be required to decide the issue of reimbursement. We believe two primary options are available:



—Provide for Amtrak to be reimbursed only for the incremental costs of providing free or reduced rate transportation to eligible persons.

—Provide for Amtrak to be reimbursed for the value of the service it provides.

If the Congress decides that Amtrak should be reimbursed only for its incremental costs, it should require ICC to update its 1972 rate determination to reflect inflation and the additional experience Amtrak has gained with the program. The Congress should also inform ICC whether the revenue from the pass riders' reduced rate fares should offset the incremental costs.

If the Congress decides that Amtrak should be reimbursed for the value of the service it provides, it may wish to establish the traditional half fare as the value to be used or establish some other value. The Congress then would have three choices. It could (1) require the railroads to pay all or a portion of the established value, (2) require pass riders to pay the established value for all their travel, or (3) pay for the travel through Federal subsidy.

## *AMTRAK COMMENTS AND OUR EVALUATION*

Amtrak commented that this report clearly sets forth the historical perspective and issues concerning reimbursement to Amtrak for pass riders. According to Amtrak, a pass rider is like any other passenger using its equipment and facilities, and Amtrak should receive reasonable fare and/or other reimbursement for the service it provides.

Amtrak said there is no doubt that pass privileges represent a valuable fringe benefit to the employees and the railroads and for this reason the incremental cost argument is inappropriate. It acknowledged that the railroads did not reimburse each other for pass riders under their past reciprocal agreements but pointed out that

Amtrak does not receive similar reciprocal benefits because it is the only intercity passenger railroad.

Amtrak said the 50-percent reimbursement rate it initially proposed that the railroads pay appeared to be reasonable given the restrictions on pass riders. Amtrak concluded that, given the congressional mandate to increase revenues and to improve its cost-to-revenue ratios, it should be entitled to reimbursement from the railroads at least equivalent to the current 25-percent formula, established by the Congress, which is a significantly larger discount than is offered the general public. (See app. I.)

We did not obtain written comments on our draft report from the numerous railroads and terminal companies, but we did consider their views during our study. As discussed in chapter 3, the railroads generally regard the pass privileges as little, if any, benefit and the present reimbursement rate as too high.

As discussed in this chapter, we did not find adequate anaytical evidence to recommend one position over the other. We believe that the Congress should decide the matter.



APPENDIX I [to the GAO Report]

National Railroad Passenger Corporation
400 North Capitol Street, N.W. Washington, D.C. 20001
Telephone (202) 383-3000

AMTRAK March 11, 1980

Mr. Henry Eschwege,
Director
Community & Economic Development Division
United States General Accounting Office
Washington, DC 20548

Dear Mr. Eschwege:

We have reviewed the GAO report "How Much Should AMTRAK be Reimbursed for Railroad Employees Using Passes to Ride its Trains?" and agree that it clearly sets forth the historical perspective and the issues concerning reimbursement to AMTRAK for pass riders who are employees of railroads and terminals.

Our position on this matter is that AMTRAK is providing a service to employees of the railroads and terminals that benefits the railroads, terminals and the employees of these organizations. From AMTRAK's point of view, a railroad pass rider is another passenger using the equipment and facilities of the Corporation as does every other passenger. As such, AMTRAK should receive reasonable fare and/or other reimbursement for pass riders employed by agencies other than AMTRAK.

We would agree, because of certain restrictions placed on pass holders, that full fare reimbursement is not equitable, for the same reason that we and other transportation modes place restrictions on discount fares.

There is no doubt that pass privileges represent a valuable fringe benefit to the employee and to the railroads.

For that reason we believe the incremental cost argument is inappropriate. AMTRAK proposed to the Congress last year that a fair value would be fifty (50) percent of the systemwide yield. This recognized that even with the fare collected from the passenger (fifty (50) percent off home railroad) AMTRAK would collect only fifty (50) percent from the railroads for travel over the pass rider's home road. This appeared to be a reasonable discount given the restrictions placed on pass riders.

Because of railroad opposition, the Congress reduced the reimbursement to AMTRAK to twenty-five (25) percent of the systemwide yield. This means that AMTRAK provides a seventy-five (75) percent fare discount for pass riders over home railroads and a twenty-five (25) percent discount for travel over other railroads. This is significantly larger than other fare discounts offered the general public.

The draft report mentions the fact that "railroads did not reimburse each other for pass riders under reciprocal agreements" but it does not mention the fact that AMTRAK does not receive any "reciprocal or interline" benefits from the other railroads since we are the sole intercity passenger railroad.

Given the Congressional mandate to AMTRAK to increase revenues and to improve cost to revenue ratios, we believe that AMTRAK should be entitled to reimbursement from railroads at least equivalent to the current formula established by Congress.

Sincerely,

/s/ Alan S. Boyd
ALAN S. BOYD
President



[Exhibit 5 to the affidavit of Roger Lewis filed in support of Defendant's Cross-Motion for Summary Judgment]

NATIONAL RAILROAD PASSENGER CORPORATION

Minutes of
Meeting of the Board of Directors
June 24, 1971

A regular meeting of the Board of Directors of NATIONAL RAILROAD PASSENGER CORPORATION was held at 955 L'Enfant Plaza North, S. W., Room 8060, Washington, D. C. on June 24, 1971, at 2:00 p.m.

There were present:

Mrs. Catherine May Bedell, Messrs. Frank S. Besson, Jr., David E. Bradshaw, John J. Gilhooley, David W. Kendall, Roger Lewis, Charles Luna, John P. Olsson, William H. Moore and William J. Quinn

constituting a quorum of the Directors.

Absent:

Louis W. Menk

Also present by invitation was Brian C. Elmer of counsel to the Corporation.

Mr. Lewis acted as Chairman of the meeting; Mr. Elmer acted as Secretary of the meeting.

*Approval of Minutes*

The minutes of the meeting of the Board of Directors held May 27, 1971 had been previously distributed to all Directors. On motion duly made, seconded and passed the minutes of that meetings were approved.

*Approval of Expenditures*

In accordance with the policy of the Board of Directors, the Chairman presented a list of bills in excess of

$25,000 for approval. On motion duly made, seconded and passed these bills (Exhibit A) were approved for payment.

*Free Transportation*

Mr. Moore advised the Board that the Corporation's existing pass policy continued to result in substantial morale problems among employees of Penn Central. There followed a discussion of the pass question and a report by Mr. Kendall on the status of litigation relating to this issue. It was decided that a meeting would be arranged between management for the Corporation, management of Penn Central, one or more of the Penn Central trustees and their counsel to discuss this matter further.

*Adjournment*

There being no further business, on motion duly made, seconded and passed the meeting was adjourned at 5:00 p.m.

/s/ Brian C. Elmer
BRIAN C. ELMER
Assistant Secretary



[Exhibit 6 of the affidavit of Roger Lewis filed in support of Defendant's Cross-Motion for Summary Judgment]

NATIONAL RAILROAD PASSENGER CORPORATION

Minutes of
Meeting of the Board of Directors
July 29, 1971

A regular meeting of the Board of Directors of NATIONAL RAILROAD PASSENGER CORPORATION was held at 955 L'Enfant Plaza North, S. W., Room 8060, Washington, D. C. on July 29, 1971, at 2:00 p.m.

There were present:

Messrs. Frank S. Besson, Jr., David E. Bradshaw, John J. Gilhooley, David W. Kendall, Roger Lewis, Charles Luna, Lewis W. Menk, William H. Moore, William J. Quinn and John A. Volpe

constituting all of the Directors.

Also present by invitation were John P. Olsson, Deputy Under Secretary of Transportation and Brian C. Elmer, of counsel to the Corporation.

Mr. Lewis acted as Chairman of the meeting; Mr. Elmer acted as Secretary of the meeting.

*Approval of Minutes*

The minutes of the meeting of the Board of Directors held June 24, 1971 had been previously distributed to all Directors. On motion duly made, seconded and passed the minutes of that meeting were approved.

*Authorization to Invest in Certificates of Deposit*

The Chairman advised the Board that, in his opinion, it was advisable for the officers of the Corporation to have flexibility to invest surplus funds of the Corporation in certificates of deposit. Accordingly, on motion duly made, seconded and passed, it was

"RESOLVED, that the President of the Corporation, and such other officer or officers as he may designate, are hereby authorized, for and on behalf of the Corporation, to invest surplus funds of the Corporation in certificates of deposit issued by any bank insured by the Federal Deposit Insurance Corporation and having deposits in excess of $500 million and for such periods of time as they may deem appropriate, provided that such funds are not otherwise prohibited from being used for such purpose by law or other agreement of the Corporation."

*Free Transportation*

The Chairman reviewed the history of the Corporation's pass policy, as currently reflected in Letter No. 10, and referred to the exchange of correspondence between the Corporation and the Penn Central.

He noted that the railroads, and particularly Penn Central, had expressed the view that the withdrawal of free transportation privileges of employees threatened to produce severe problems for the railroads, which it was felt, would end by being harmful to Amtrak.

A lengthy discussion followed in which the requirement that Amtrak operate on a for-profit philosophy, the impracticability of a pass policy that required employees to declare whether travelling for personal or business reasons, and the over-all difficulties of assuring employee support during a difficult transition were thoroughly explored. As a result, the Board concluded that an exception to the present policy which would offer limited privileges to employees of the operating railroads was highly desirable at the present time but that these privileges should be limited to the employee's home railroad, and that the privilege itself should be eliminated as soon as possible. It was felt that these objectives could best be realized by limiting the privilege to employees of the operating railroads for use on their home railroad and who



were full time employees of that railroad prior to May 1, 1971, thus permitting the gradual elimination of the privilege through attrition. Accordingly, on motion duly made by Mr. Luna, seconded by Mr. Bradshaw, and unanimously adopted (Messrs. Menk, Moore and Quinn abstaining), it was

"RESOLVED, that the current pass policy of the Corporation, as expressed in Letter No. 10, be modified to permit free transportation of persons who were employed by an operating railroad on April 30, 1971, while such persons are travelling on the railroad which employs them."

*Adjournment*

There being no further business, on motion duly made, seconded and passed, the meeting was adjourned at 4:30 p.m.

/s/ Brian C. Elmer
BRIAN C. ELMER
Assistant Secretary

[Exhibit 7 to the affidavit of Roger Lewis filed in Support of Defendant's Cross-Motion for Summary Judgment]

ASSOCIATION OF
AMERICAN RAILROADS

American Railroads Building • Washington, D.C. 20036

I. SEWELL MORRIS
*Vice President—*
*Assistant to President*

June 10, 1971

Dear Frank:

Per your request, a survey has been made primarily of a number of roads under contract to AMTRAK concerning their pass policies prior to May 1, 1971, the date AMTRAK commenced operations.

It was initially hoped that those policies could be laid out in chart form. However, they varied in so many details that a summary-type analysis was determined to be more feasible.

I—THE FOLLOWING IS A SUMMARY OF THE MAJOR PASS POLICY PROVISIONS:

1) Most roads authorized annual passes over their home roads to employees and dependents based primarily upon length of service of the employee, varying usually in periods of service from 5 to 10 years or more.

2) Generally pass privileges to retired employees and dependents were extended on the same basis as existed at time of retirement of the employee.

3) Trip passes were generally extended to employees and their dependents, in which short periods of service were involved, and for which annual passes were not authorized.



4) Restrictions were often imposed to limit use of passes, either annual, trip or ½ fare, on certain trains.

5) One-half rate orders were frequently authorized on a reciprocity basis for personal travel by employees below title of Vice President.

6) Annual and/or lifetime passes on a reciprocity basis, with some exceptions, were usually only extended to personnel with title of vice president or higher and their dependents.

7) Passes of varying privilege were extended by many roads to a variety of non-railroad personnel, but there was a definite accelerating trend to restrict or eliminate that type of privilege.

II—PROVISIONS OF LABOR AGREEMENTS AFFECTING PASS PRIVILEGES

1) Some labor contracts contain provisions for certain employees (in some cases dependents, too) to be given free transportation. (Examples: Some contracts specifically provided for that privilege for conductors, telegraphers, agents, electrical workers, etc., and in some instances for their dependents).

2) Most collective bargaining agreements contain rules which provide that employees covered in such agreements, and those dependent upon them for support, will be given the same consideration in granting free transportation as is granted other employees in service. The effect of such rules is the establishment of the principle of "me too"; or "if one category of employees is given a pass privilege, all other employees want that same privilege".

## III—ANALYSIS OF THE CURRENT AMTRAK PASS POLICY

1) Transportation is authorized on a ½ fare basis, on a nationwide system basis for both railroad business and for personal travel. Railroad pass policy varied in that business travel was provided on a "free basis" on home roads and in most cases no more than on a ½ fare basis on a reciprocity basis. Personal travel, including dependents, when authorized, was usually confined to home roads. So, while AMTRAK policy, for both railroad business travel, and for personal travel, is authorized on a nationwide basis, a ½ fare is assessed, plus full fare for reserved coach, parlor car or sleeping space.

2) Use of rail transportation for business travel, as on the then "free basis", reported in the April study, except for a couple of roads, was minimal. Hence if the ½ fare assessment were dropped, no significant increase in that type of travel could be expected.

3) Based upon discussions with many railroad people, it is the overwhelming consensus that the ½ fare policy for personal travel, even though it is extended on the nationwide basis, is expensive and beyond the reach of most employees, and particularly retired personnel.

## IV—UNOFFICIAL COMMENTS

1) Railroad employees have attached great importance to pass privileges. They have considered them part of their employment privileges and as a fringe benefit and reward for service. Incidentally other modes offer similar inducements for faithful service—the air industry, for example, on a very liberal basis.



2) Accurate records and data are not available to measure the actual use of pass privileges prior to AMTRAK. Most rail representatives indicated that insofar as personal travel was concerned, it was estimated not to exceed 5% of pass privileges outstanding in any one year.

3) Travel by employees on commuter trains carry the vast percentage of railroad employees who travel by train to and from work.

4) Except for commuter travel, one railroad, for example, had restricted travel privileges on a free basis to employees in service prior to a specified date. Many rail representatives express the view this type of policy could be applied on a broader scale.

5) Suggestion was made that if AMTRAK wanted to liberalize its present policy, it might consider "free transportation" to employees on their home road.

6) Other suggestions were made to grant "free transportation" to employees on home roads, with ½ fare provisions over other roads.

7) Suggestion that AMTRAK passes on a systemwide basis to officers of the title of Vice President and above, including dependents, would not involve any substantial travel. It would be more of a complimentary gesture in keeping with custom and tradition.

8) Suggestion was made that any liberalization of the AMTRAK pass policy be on a trial basis to get a measure of travel involved.

9) Suggestion was made that passes only be issued on request. The number of passes outstanding was considered an unmeaningful statistic.

10) Suggestion was made that passes, for personal travel, with exceptions, be issued by AMTRAK roads, pursuant to guidelines established by AMTRAK, on a trip basis, with only so many trips in any calendar year.

I would like to repeat that the suggestions are purely informal and unofficial, given to me by various people, experienced in the pass problem.

If I can be of further help, please advise.

Sincerely,

/s/ Luke

General Frank S. Besson, Jr.
National Rail Passenger Corporation
955 L'Enfant Plaza North, S. W.
ASTROL Building
Washington, D.C. 20024



[Exhibit 9 to the affidavit of Roger Lewis filed in support of Defendant's Cross-Motion for Summary Judgment]

NW

NORFOLK AND WESTERN RAILWAY COMPANY
Roanoke, Virginia 24011

October 7, 1971

Robert B. Claytor
Executive Vice President

Mr. Roger Lewis
President
National Railroad Passenger Corporation
955 L'Enfant Plaza, S. W.
Washington, D.C. 20024

Dear Mr. Lewis:

I am writing you with regard to Amtrak's policy of free and reduced rate transportation insofar as it pertains to Norfolk and Western Railway Company, which is a participating railroad in Amtrak even though, as you know, Amtrak has not elected to operate any trains over our line.

I have seen a copy of Amtrak's Executive Memorandum No. 71-18, dated September 17, 1971, which I understand is the most recent statement of policy with respect to free and reduced rate transportation. This memorandum provides for the issuance of reduced rate transportation to "participating railroads" but thereafter defines this term as including only those railroads "operating passenger trains pursuant to a contract with Amtrak." These railroads are thereafter listed and, as you know, the list does not include Norfolk and Western.

It seems to me that this memorandum which excludes Norfolk and Western employees from obtaining reduced rate transportation on Amtrak trains is discriminatory,

unfair and apparently contrary to the policy which Amtrak directors have adopted. Norfolk and Western has elected to join Amtrak at a cost of some $6 million. We have cooperated with Amtrak in every way possible, including the sale to Amtrak of some 16 coaches and spare parts therefor at a total price of only $62,000. This passenger equipment was all in first-class condition and included three dome coaches. In return, we would ask that our employees have the same right to reduced rate transportation as other Amtrak lines.

Recently, Mr. W. H. Moore, President of Penn Central, informed me that several weeks ago the directors of Amtrak adopted a general policy as to free and reduced rate transportation, which purportedly has been implemented by the September 17 memorandum. From this conversation, I gathered that it was the intention of the directors that the employees of all railroads which have joined the Amtrak system should be entitled to the same treatment as to reduced rate transportation, regardless of whether Amtrak elected to operate a train over the involved line. If this is correct, the September 17 memorandum is patently in error.

I would appreciate your reviewing this matter and letting me know whether in view of these circumstances you agree that Norfolk and Western employees should be afforded reduced rate transportation. If you do not concur, I would appreciate your bringing this matter before the Amtrak Board for clarification.

Yours very truly,

/s/ Robert B. Claytor
ROBERT B. CLAYTOR

ccs: Messrs. William H. Moore
William J. Quinn
Louis W. Menk



[Exhibit 10 to the affidavit of Roger Lewis filed in support of Defendant's Cross-Motion for Summary Judgment]

NATIONAL RAILROAD PASSENGER CORPORATION
955 L'Enfant Plaza North, S.W.
Washington, D.C. 20024

Telephone (202) 554-5700

October 15, 1971

AMTRAK

Dear Mr. Claytor:

Thank you for your letter of October 7th concerning our pass policy. I appreciate the difficulties this must be causing you and welcome an opportunity to comment on the points you raise.

The 1970 Act creating AMTRAK requires us to operate a basic nationwide intercity passenger service designated by the Secretary of Transportation; to improve and modernize railroad passenger service; and to do this at a profit.

Railroads were given an opportunity to withdraw from passenger service by payments based on 1969 losses and AMTRAK has purchased a limited number of passenger cars from the large number available. We do not, however, believe that agreements of this kind should determine our pass policy.

You can get some idea of our problem from the fact that there were on May 1st an estimated 1,400,000 passes outstanding throughout the country. I think you can also appreciate the impossibility of explaining to Congress a costly extension of privilege for which there is no consideration while asking for public funds to cover substantial operating deficits which we will have to do.

This matter received the closest attention from the Incorporators before May 1st and the Board subse-

quently and it was felt that while we could justify reduced rate transportation to employees, dependents and retirees of AMTRAK, the railroads and the terminal companies which actually performed passenger service operations for AMTRAK, we could not continue or extend the same privileges to individuals or groups not performing such services on a regular basis for us. We had to draw a line somewhere and this seemed most reasonable to us.

I am sorry that I cannot respond to your letter in a more helpful or even hopeful manner but this is a very difficult situation for us as well and we feel we have very little latitude with respect to the basic question.

I will, of course, report your letter to the Board at our next meeting as you request. For your information, I am enclosing a copy of our policy, revised as of October 1, 1971.

Very truly yours,

ROGER LEWIS
President

Mr. Robert B. Claytor
Executive Vice President
Norfolk and Western Railway Company
Roanoke, Virginia 24011

Enclosure

Copy for Mr. Medvecky



[Exhibit 11 to the affidavit of Roger Lewis filed in support of Defendant's Cross-Motion for Summary Judgment]

*Amtrak Fiscal Year 1980 Authorization and Amtrak Route Restructuring*: Hearings Before the House Subcommittee on Transportation and Commerce of the Committee on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 244-46 (1979) (Statement of Richard K. Knowlton, Vice President—Law, Atchison, Topeka & Santa Fe Railway Co.)

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• • • •

Mr. FLORIO. Mr. Knowlton, what percentage of cost does that represent? That is, the old figure, and the proposed new figure?

Mr. KNOWLTON. The old figure of $500,000 represents approximately 10 percent of the average revenues received by Amtrak, slightly less than 1 cent. The new figure represents 4.5 cents per mile for every free or reduced-rate passenger. Based on the Amtrak figures on passenger riders, that would amount to $7.7 million a year, as compared to the actual costs which we now pay of slightly over $500,000 a year.

• • • •

Mr. FLORIO. Mr. Knowlton, certainly, things have changed rather substantially since Amtrak first went into business and these understandings were arrived at. The very concept of Amtrak being a profit operation is now dissipated legally as well as in terms of common sense.

Mr. KNOWLTON. That is correct, Mr. Chairman.

Mr. FLORIO. My recollection is that Amtrak was receiving revenues as a proportion of costs, approximately at the ratio of 50 percent of revenues. The ratio is now down to about 37 percent in which 37 cents is supplied by the passenger while the balance is supplied by the taxpayer.

Mr. KNOWLTON. That is correct.

Mr. FLORIO. Well, if that is the case, then I am not sure how you can justify saying that $500,000 pays the cost of transporting these railroad employees over the Amtrak system.

Mr. KNOWLTON. The $500,000, Mr. Chairman, is determined pursuant to the present bill, and it is the determination of the actual cost incurred for the incremental transportation provided. It is determined in two ways. Amtrak and the railroads have contracted by which the railroads pay the full actual cost incurred by Amtrak in implementing the program. Amtrak and the railroads went to the Interstate Commerce Commission and asked it to determine the cost of transporting these persons, these free and reduced-rate pass holders on the trains. The Commission determined a mileage figure for that. That has been paid.

• • • •

Mr. FLORIO. Well, I am suggesting that Congress has obviously given some serious consideration to modifying those rules, or that former agreement, under the circumstances. It is fairly clear that you are saying that you do not agree with this change of policy.

All I am saying is that it seems somewhat difficult to accept railroad employees riding for virtually free, which is about what $500,000 represents in terms of the cost of transporting those employees over the lines, if, in fact, the taxpayers are paying $2 for every $1 of the general passenger public.

Mr. KNOWLTON. That is the cost that Amtrak incurs in transporting these employees because, these employees move as space-available passengers.

Now, Mr. Chairman, I think we have a little disagreement on one point, and that is that it is Congress which has prescribed that these employees shall have pass rights.

Mr. FLORIO. Congress does not always do the right thing, and I think that it is time to reevaluate this policy.

• • • •



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted in Printing]

**INTERVENOR-DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Intervenor-defendant United States of America ("United States") hereby moves pursuant to Rules 12(b)(1) and 12(b)(6), F.R.Civ.P., that this Court enter an order dismissing this action upon the grounds that plaintiffs lack standing to challenge the constitutionality of Public Law 92-316 and that plaintiffs' challenges to the constitutionality of Public Law 92-316 and Public Law 96-73 fail to state any claim upon which relief can be granted.

Alternatively, the United States moves pursuant to Rule 56(b), F.R.Civ.P., that this Court enter summary judgment in its favor. There is no genuine issue as to any material fact and the United States is entitled to judgment as a matter of law because: (1) plaintiffs lack standing to challenge the constitutionality of Public Law 92-316; and (2) both Public Law 92-316 and Public Law 96-73 are constitutional.

A memorandum in support of this motion is submitted herewith.

[Signatures Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title Omitted in Printing]

**FIRST AMENDMENT TO COMPLAINT**

The Complaint in this action is hereby amended as follows:

1. The following allegations are added to paragraph 11 of Count I of the Complaint:

> "On August 13, 1981, Section 405(f) of the Act was further amended by Section 1184 of Public Law No. 97-35 ("P.L. 97-35"), 95 Stat. 697, to delete the two-year time limitation applicable to the reimbursement requirement set forth in P.L. 96-73. Whenever P.L. 96-73 or Section 405(f) of the Act is hereafter referred to in this Complaint, such reference shall include the amendment made by P.L. 97-35."

2. The remaining paragraphs of the Complaint which incorporate by reference the allegations of paragraph 11 of Count I shall also incorporate by reference the foregoing additional allegations of such paragraph.

[Signatures Omitted in Printing]

# APPELLEE'S

# BRIEF

CORRECTED COPY

Nos. 83-1492 and 83-1633

Supreme Court, U.S.
FILED
NOV 15 1984
ALEXANDER L. STEVAS

# In the Supreme Court of the United States

OCTOBER TERM, 1984

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NATIONAL RAILROAD PASSENGER CORPORATION, APPELLANT

*v.*

ATCHISON, TOPEKA, AND SANTA FE RAILWAY CO., ET AL.

---

ATCHISON, TOPEKA, AND SANTA FE RAILWAY CO., ET AL., CROSS-APPELLANTS

*v.*

NATIONAL RAILROAD PASSENGER CORPORATION

---

*ON APPEAL AND CROSS-APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES AS APPELLEE SUPPORTING THE NATIONAL RAILROAD PASSENGER CORPORATION

---

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45pp

## QUESTIONS PRESENTED

1. Whether a railroad that was relieved, under the Rail Passenger Service Act (RPSA), 45 U.S.C. 561(a), of "its responsibilities as a common carrier of passengers by rail in intercity rail passenger service," thereby obtained a contractual right against being required to reimburse Amtrak for free or reduced-fare transportation furnished to the railroads' present and retired employees and their dependents (No. 83-1492).

2. Whether such a railroad has a contractual right against being required to subsidize Amtrak and whether the reimbursement formula in 45 U.S.C. 545(f) impairs such a right (No. 83-1633).

3. If 45 U.S.C. 545(f) impairs any such rights, whether the Due Process Clause is violated.

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# In the Supreme Court of the United States

OCTOBER TERM, 1984

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No. 83-1492

NATIONAL RAILROAD PASSENGER CORPORATION, APPELLANT

*v.*

ATCHISON, TOPEKA, AND SANTA FE RAILWAY CO., ET AL.

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No. 83-1633

ATCHISON, TOPEKA, AND SANTA FE RAILWAY CO., ET AL., CROSS-APPELLANTS

*v.*

NATIONAL RAILROAD PASSENGER CORPORATION

---

*ON APPEAL AND CROSS-APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES AS APPELLEE SUPPORTING THE NATIONAL RAILROAD PASSENGER CORPORATION

---

### OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-10a)[1] is reported at 723 F.2d 1298. The decision of the district court (J.S. App. 11a-27a) is unreported.

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[1] "J.S. App." refers to the appendix to the jurisdictional statement in No. 83-1492.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 28a-29a) was entered on December 13, 1983. On January 10, 1984, the National Railroad Passenger Corporation (Amtrak) filed a notice of appeal to this Court (J.S. App. 31a-32a).[2] On March 9, 1984, Amtrak filed its jurisdictional statement (No. 83-1492). This Court noted probable jurisdiction on October 1, 1984. Jurisdiction of this appeal is invoked under 28 U.S.C. 1252.

On April 6, 1984, appellees Atchison, Topeka and Santa Fe Railroad, et al. (the railroads) filed a notice of cross-appeal. On April 6, 1984, the railroads filed a jurisdiction statement on cross-appeal (No. 83-1633). Jurisdiction was invoked under 28 U.S.C. 1252. In response, Amtrak and the United States agreed that if this Court noted probable jurisdiction of Amtrak's appeal, the Court should do so for the railroads' cross-appeal as well. On October 1, 1984, this Court deferred consideration of the question of jurisdiction with respect to the railroads' cross-appeal until consideration of the case on the merits.

We see no jurisdictional defect in the cross-appeal. After Amtrak appealed to this Court under 28 U.S.C. 1252, any subsequent appeal or cross-appeal had to be taken to this Court as well. See *Heckler* v. *Edwards*, No. 82-874 (Mar. 21, 1984), slip op. 9; *Regan* v. *Taxation With Representation*, No. 81-2338 (May 23, 1983), slip op. 2 n.3. Moreover, since

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[2] The United States also filed a notice of appeal from the judgment of the court of appeals (J.S. App. 31a-32a). However, the Solicitor General decided not to docket a separate appeal but instead to participate as an appellee in support of Amtrak.



cross-appellant seeks relief broader than that granted by the court of appeals' judgment (see 83-1633 J.S. 7), cross-appeal was proper.

## STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Rail Passenger Service Act, 45 U.S.C. 501 *et seq.*, are set out at J.S. App. 40a-45a.

## STATEMENT

1. The Rail Passenger Service Act (RPSA or the Act), 45 U.S.C. 501 *et seq.*, took effect on May 1, 1971. Before then, numerous private railroad companies, including all of the railroads in this case, provided intercity rail passenger service in the United States. GAO, Comptroller General, *Nos. B-196907, CED-80-83, Report to the Congress*, "How Much Should Amtrak Be Reimbursed For Railroad Employees Using Passes to Ride Its Trains?," at 2 (Mar. 28, 1980) [hereinafter cited as GAO Report]. Beginning in the 1880s, many railroads permitted current and retired employees and their dependents to travel on their passenger trains free or at reduced rates. *Ibid.* Many railroads also had reciprocal agreements allowing employees to travel on other railroads at reduced rates, usually half fare. *Ibid.*

By 1970, the railroads were losing huge sums as a result of their obligation to provide intercity passenger service, and many had petitioned the Interstate Commerce Commission for permission to discontinue passenger trains. H.R. Rep. 91-1580, 91st Cong., 2d Sess. 2 (1970). Congress responded to this crisis by enacting the RPSA. The RPSA established Amtrak as a for-profit corporation to provide intercity passenger service (45 U.S.C. 541). The RPSA also established a procedure under which railroads could obtain relief from their passenger service obligations—relief that previously was available

only by petitioning the ICC (49 U.S.C. (1970 ed.) 1 (18)). Under the new procedure, the railroads relinquished their passenger routes in order to enable Amtrak "to undertake passenger service on a timely basis" (45 U.S.C. 561(a)). The railroads were also required to pay Amtrak an amount equal to one-half their financial losses from intercity passenger service during 1969 (45 U.S.C. 561(a)(2)) and to provide Amtrak with services and the use of tracks and other facilities at rates to be agreed upon by the parties or, in the event of disagreement, by the ICC (45 U.S.C. 561(a)-(c)).

Pursuant to Section 401 of the RPSA, 45 U.S.C. 561, most of the railroads that had previously provided intercity rail passenger service (including all of the railroads involved in this case) entered into standardized contracts, called "Basic Agreements," with Amtrak. See *The National Railroad Passenger Corporation Agreement* (Apr. 16, 1971) [hereinafter cited as Basic Agreement]. Section 2.1 of the Basic Agreement, entitled "Relief from Responsibility," reflects the release of the railroads from their former obligation to provide intercity rail passenger service.[3]

[3] Section 2.1 provides:

> From and after May 1, 1971, Railroad shall be relieved of its entire responsibility for the provision of Intercity Rail Passenger Service. Railroad shall not, without the prior written consent of [Amtrak], operate or provide any regularly scheduled Intercity Rail Passenger Service except pursuant to and in accordance with this Agreement.
>
> If, having fully complied with the notice or other provisions of Section 401(a)(1) of the Act, Railroad is required, because of any order of any Federal, State or local court or agency of government, whether or not such order is lawfully issued, to continue or resume operation of any Intercity Rail Passenger Train beyond April 30, 1971, [Amtrak] and Railroad will cooperate in efforts to effectuate discontinuance thereof.



The Basic Agreements mirrored the RPSA in numerous other respects, imposing upon the railroads significant responsibilities incidental to the provision of intercity rail passenger service. Like Section 402 of the RPSA, 45 U.S.C. 562, Articles 3 and 4 of the Basic Agreements required the railroads to make services, tracks, and facilities available to Amtrak. And like Section 405 of the RPSA, 45 U.S.C. 565, Section 7.3 of the Basic Agreements required the railraods to protect employees who might subsequently be affected by a discontinuance of passenger service.

Section 7.5 of the Basic Agreements deals with transportation privileges. The fifth paragraph, which concerns pass rider benefits, states:

> Transportation privileges, if any, with respect to business and personal travel of Railroad personnel shall be as determined by [Amtrak].

Unlike the previous paragraph of Section 7.5, this paragraph does not specify which party is to bear the cost of pass rider transportation.

When Amtrak came into being, it decided for reasons of economy to adopt a pass rider policy more restrictive than that which the railroads had employed. As a result, many railroad employees lost their pass privileges.[4] Later in 1971, Amtrak adopted a less restrictive pass rider policy but did not restore many of the pass rider benefits that had previously been cancelled. GAO Report 3. Moreover, the new policy was subject to change or cancellation by Amtrak. *Ibid.*

The railroads vigorously protested Amtrak's actions. Noting that railroad employees attached

[4] Exhibit 4 to Amtrak's Motion for Summary Judgment, Docket Item No. 36.

great importance to their pass rider benefits, the railroads expressed concern about substantial morale problems and the possibility of strikes. Employees of the Penn Central Railroad threatened to strike over the issue of pass rider service.[8] This threat was sufficiently serious for a federal court to issue a temporary restraining order. *Baker* v. *System Federation No. 1*, 331 F. Supp. 1363, 1364-1365 (E.D. Pa. 1971).

In 1972, Congress determined that the railroads' pass rider policies should be reinstated. The Senate Committee Report accompanying the proposed pass rider legislation stated (S. Rep. 92-756, 92d Cong., 2d Sess. 11 (1972)):

> The Committee believes that employees who were entitled to free or reduced-rate transportation before the advent of Amtrak should not lose such privileges on account of the transfer of passenger service from the railroads to Amtrak.

Similarly, the House Committee Report observed (H.R. Rep. 92-905, 92d Cong., 2d Sess. 11 (1972)):

> Railroads have traditionally offered employees some form of free or reduced fares, both "on line" and "off line." This section requires Amtrak to continue the tradition of according transportation service to railroad employees to the maximum extent practicable.

In order to restore the pass rider benefits, Congress added Section 405(f) to the RPSA (45 U.S.C. 565(f)). Pub. L. No. 92-316, § 8, 86 Stat. 230. Sec-

[8] Lewis Aff. ¶¶ 4-5, 7-8; Amtrak's Motion for Summary Judgment, Exhs. 5-7 & 9.



tion 405(f) required Amtrak to assure, to the maximum extent practicable, that pass rider privileges were preserved for all railroad employees, retirees, and their dependents who had been eligible for such benefits when Amtrak assumed operation of the passenger lines on April 30, 1971. In floor debates on this legislation, Senator Church stated that "the loss of, or reduction of, free pass privileges by railroad employes entitled to them was a breach of faith with these people." 118 Cong. Rec. 14792 (1972). Senator Percy stated that the railroads "must also deliver on their promises of long standing" (*id.* at 14791).

Amtrak implemented this program by permitting pass riders to "travel free or at half fare depending on factors such as length of railroad employment, whether they are retired, and whether they are traveling on or off the rail lines of their home railroads." GAO Report i. Pass riders may not use metroliners, may not make reservations on reserved trains until 24 hours before departure, and once on board unreserved trains, "pass riders are supposed to stand if there are not enough seats." *Ibid.*

As originally enacted, Section 405(f) also required the railroads to reimburse Amtrak for "such costs as may be incurred" in providing the pass rider benefits. Pub. L. No. 92-316, § 8, 86 Stat. 230. The Senate Committee explained (S. Rep. 92-756, *supra*, at 11):

> Because Congress is merely continuing pass policies which the railroads themselves developed, it would appear that the railroads and not Amtrak should bear the cost, if any.

Section 405(f) did not specify how these costs were to be calculated but provided for the matter to

be referred to the ICC if Amtrak and the railroads were unable to reach agreement. Pub. L. No. 92-316, § 8, 86 Stat. 230. When the matter was subsequently referred to the ICC pursuant to this provision, the ICC required the railroads as an interim tive costs of operating the pass rider program. *Determination of Cost Reimbursement Under Section 405(f) of the Rail Passenger Service Act, As Amended*, 347 I.C.C. 325 (1972); J.A. 23-37. The ICC recognized that honoring the pass privileges might result in some substantial costs for Amtrak. The Commission noted (347 I.C.C. at 332; J.A. 34) that reservations made by pass riders might " 'block' potential full revenue passengers." The Commission also noted (347 I.C.C. at 333; J.A. 34) that "[t]here is no suggestion in the record as to how the space-available limitation can be enforced on * * * non-reserved trains, short of excluding pass riders from using them." Observing that the data before it were "not as reliable as is ordinarily desirable," the Commission approved "an interim payment of 0.79 cents per passenger-mile" subject to "possible adjustment in the future, perhaps with an effect retroactive to the date of this decision" (347 I.C.C. at 333-335; J.A. 36). The ICC also specified that such payments were to be offset by reduced-rate fares paid by pass riders (347 I.C.C. at 334; J.A. 36). When this formula was applied, the amount of the reduced-rate fares paid by the pass riders always exceeded, and thus fully offset, the payments otherwise due from the railroads. GAO Report 5.

In 1979, Congress determined that the reimbursement received by Amtrak for pass rider service was not adequate. Congressman Florio, sponsor of the pass rider legislation during that session, said that



he found it "somewhat difficult to accept railroad employees riding for virtually free * * * if, in fact, the taxpayers are paying $2 for every $1 of the general passenger public." *Amtrak Fiscal Year 1980 Authorization and Amtrak Route Restructuring: Hearings on H. Res. 93, 97, 105, et al. Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 244-246 (1979).

In the Amtrak Reorganization Act of 1979, Pub. L. No. 96-73, § 120, 93 Stat. 547, therefore, Congress amended Section 405(f) to require the railroads prospectively to reimburse Amtrak for pass rider service at the rate of "25 percent of the systemwide average monthly yield per revenue passenger mile" (*i.e.*, approximately one-fourth of the normal fares for ticket-buying passengers). The new rate was to remain in effect for a two-year period. The Act also directed the Comptroller General to conduct a study and make recommendations concerning the appropriate method of reimbursement.

In 1980, the Comptroller General submitted his report to Congress. The report analyzed in detail two methods of reimbursement: first, reimbursement to Amtrak for the administrative costs of providing pass rider service (as the ICC had originally required); and, second, reimbursement to Amtrak for the value of such service (as required by the 1979 Amendment). GAO Report iv. The Comptroller General concluded that it was impossible to determine with precision either the administrative costs to Amtrak of pass rider service or the value to employees of a pass privilege. *Id.* at ii. Further, he advised Congress that he was unable to find "adequate analytical evidence to recommend one position over the other." *Ibid.* Therefore, the Comptroller

General concluded that the choice between the two reimbursement formulas was "a policy decision the Congress should make." *Ibid.*

After receiving the GAO report, Congress once again amended Section 405(f) in 1981 and provided that the 25% reimbursement requirement would remain in effect indefinitely.

2. This case began in 1980 when five railroads (appellees in No. 83-1492 and cross-appellants in No. 83-1633) brought suit against Amtrak in the United States District Court for the Northern District of Illinois, challenging the constitutionality of Section 405(f). The railroads' principal contention was that Section 405(f) impaired a contractual right granted to them by Section 401(a) of the RPSA, 45 U.S.C. 561(a), and their Basic Agreements with Amtrak. The railroads contended that these provisions gave them the contractual right permanently to be relieved from all responsibility for the provision of intercity passenger service. The railroads also argued that even if they had no contractual rights against the United States, "the congressionally ordered transfer of wealth from the railroads to their current and past employees and their families (the pass riders) is a deprivation of property without due process of law, in violation of the Fifth Amendment" (J.S. App. 16a (footnote omitted)). Because the constitutionality of an Act of Congress was drawn in question, the United States intervened as a defendant. See 28 U.S.C. 2403(a).

In November 1982, the district court issued an opinion upholding the statute and dismissing the case (J.S. App. 11a-27a). The court first held that the RPSA itself does not constitute a contract between the United States and the railroads (J.S.



App. 17a). The court noted (*ibid.*) that "[t]he language of the statute * * * is clearly not that of a contract." By contrast, the court assumed (J.S. App. 18a) that the Basic Agreement was a contract between the United States and the railroads, but the court held that Section 405(f) did not impair that contract. The court observed that the Basic Agreement "relieves the railroads from their 'entire *responsibility* for the provision of Intercity Rail Passenger Service'" (J.S. App. 18a, quoting Basic Agreement Section 2.1 (empasis in court's opinion)). The court then noted (J.S. App. 18a) that by the railroads' own admission, they never had a legal or contractual responsibility to provide free or reduced-rate transportation to employees and their families but had instead done so gratuitously. The court further noted (J.S. App. 19a) that another provision of the Basic Agreement (Section 7.5) gave Amtrak the right to determine such transportation privileges.

The court next rejected (J.S. App. 19a-26a) the railroads' substantive due process argument, holding that the railroads had not overcome the heavy presumption of constitutionality that applies to "legislative Acts adjusting the burdens and benefits of economic life" (*Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976)).

Finally, the court (J.S. App. 26a-27a) found no merit in the railroads' claim that the particular reimbursement formula chosen by Congress in the 1979 amendment violates due process by requiring the railroads to pay more than Amtrak's costs. The court held that Congress had acted rationally in choosing a formula based on the value of the pass privileges rather than Amtrak's costs (*ibid.*). The court noted (*ibid.*) that the GAO had reported to

Congress that it "did not find adequate analytical evidence to recommend one position over the other" and that the GAO report had concluded that the choice between a cost or value-based formula was "a policy decision that the Congress should make." GAO Report ii, 30. Relying on *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 18-19, the court held that the choice between such formulas does not present a constitutional question (J.S. App. 27a).

3. The court of appeals affirmed in part and reversed in part (J.S. App. 1a-10a). The court agreed (*id.* at 9a) that Section 405(f) is a legitimate exercise of Congress's power under the Commerce Clause. The court also agreed (J.S. App. 4a) that "Congress did not act unconstitutionally in requiring the railroads to reimburse Amtrak for employee pass privileges." The court of appeals noted that Section 405(f) of the RPSA and Section 2.1 of the Basic Agreement state that the railroads are relieved of any "responsibility" for providing intercity railroad passenger service, and the court held that these provisions do not apply to reimbursement for pass rider privileges because the railroads never had a "responsibility" to furnish those privileges.

While the court found that the railroads had no contractual right against compelled reimbursement, the court concluded (J.S. App. 8a) that the railroads did have contractual protection against being required "to finance aspects of [Amtrak's] operations that were once part of the railroads' entire responsibility for the provision of intercity rail passenger service." The court held that the railroads enjoyed this contract right under the Basic Agreement (see J.S. App. 4a, 8a, 10a), and the court found it unnecessary to decide whether Section 401(a) of the RPSA conferred a similar contractual right (J.S. App. 4a).



Having decided that the railroads had a contractual right under the Basic Agreement not to be called upon to finance Amtrak's operations, the court of appeals then held (J.S. App. 8a (footnote omitted)) that Section 405(f) "authorizes Amtrak to breach the basic agreement." Reasoning that "passholders occupy seats that would otherwise be empty" (J.S. App. 10a), the court concluded (*id.* at 8a-10a) that any reimbursement in excess of Amtrak's "costs"—by which the court appears to have meant merely Amtrak's administrative costs in operating the program—would constitute a subsidy or "windfall" for Amtrak. The court therefore held that Section 405(f) violated the Due Process Clause.

4. Amtrak appealed to this Court, contending that the reimbursement formula in Section 405(f) is constitutional (No. 83-1492). The railroads cross-appealed, arguing that required reimbursement under any formula violates due process (No. 83-1633). The United States, which intervened below, is participating in support of Amtrak as an appellee in both cases.

## INTRODUCTION AND SUMMARY OF ARGUMENT

For many years, private railroads in this country gratuitously provided their employees and retirees and their dependents with what are known as "pass rider privileges," *i.e.*, the privilege of traveling free or at a reduced fare on the trains of the employer railroad and certain other railroads with which reciprocal arrangements had been made. By 1970, passenger train service had become highly unprofitable. The Rail Passenger Service Act, 45 U.S.C.

501 *et seq.*, gave financially struggling railroads the opportunity to turn over their passenger lines to the National Railroad Passenger Corporation (Amtrak). A railroad choosing to take advantage of the RPSA was "relieved of all its responsibilities as a common carrier of passengers by rail in intercity rail passenger service" (45 U.S.C. 561(a)). A participating railroad was also required to enter into an implementing contract (called a "Basic Agreement") with Amtrak. Section 405(f) of the RPSA, 45 U.S.C. 565(f), which was later added and amended, requires Amtrak to honor the pass rider privileges held by the railroads' employees and retirees and their dependents. Section 405(f) also requires the railroads to reimburse Amtrak for approximately one-fourth the ticket price of transportation provided to pass riders.

The railroads involved in this case took advantage of the RSPA to shed their passenger service obligations, while retaining their freight lines. They now claim that the RPSA and their Basic Agreements with Amtrak gave them a contractual right to be free in perpetuity from any attempt by Congress to reimpose any common carrier obligations relating to passenger service. They also assert a contractual right to be free from making any payments that may constitute a subsidy for Amtrak. And they claim that these alleged contract rights protect them from having to make the reimbursements required by Section 405(f). The railroads' claims are devoid of merit.

## I.

In the first place, neither the RPSA nor the Basic Agreements gave the railroads a contractual right against reimposition of common carrier obligations relating to passenger service. There is a strong pre-



sumption that statutes do not create contractual obligations that restrict future government action, and this presumption has special force where, as in this case, it is claimed that the government has bartered away a portion of an important sovereign power, such as the power to regulate commerce. Here, it is clear that the RPSA is not a contract. "The language of the statute * * * is clearly not that of a contract," as the district court accurately observed (J.S. App. 17a). Instead, the RPSA merely granted the railroads regulatory relief from some of their common carrier obligations. The railroads obtained the same relief they would have obtained had they successfully petitioned the Interstate Commerce Commission for discontinuance of their passenger service, and such relief would have provided no guarantee against reimposition of passenger service obligations as long as the railroads continued to operate freight lines in interstate commerce.

The Basic Agreement likewise did not give the railroads a contractual right against the reimposition of common carrier obligations. Only the government could conceivably confer such a right, and the government was not a party to the Basic Agreement. Any attempt by private parties to restrict future government action by contract would obviously be ineffectual. The Basic Agreement did not attempt to impose such restrictions but merely stated that the transfer of passenger service obligations from the railroads to Amtrak was the purpose of the agreement and perhaps a condition of its performance.

## II.

A. Even if the RPSA or the Basic Agreement gave the railroads contractual rights against the United States, those rights are not violated by Sec-

tion 405(f). At most, a railroad would have a right against reimposition of "its responsibilities as a common carrier of passengers by rail in intercity rail passenger service" (45 U.S.C. 561(a)). In other words, the railroad could not be compelled to resume operation of passenger trains. Such a right would not mean that the railroad could not be required to reimburse Amtrak for the use of pass rider privileges. The difference is as great as the difference between running a railroad and buying someone a ticket.

The railroads' attempt to construe the RPSA more broadly is unpersuasive. Contrary to the railroads' suggestion, the RPSA did not relieve them from the responsibility of doing anything that is related to rail passenger service. On the contrary, the RPSA expressly requires the railroads to assist Amtrak in many ways, such as by providing the use of track, services, and facilities. See 45 U.S.C. 545, 652. All of these measures are far more directly related to common carrier responsibilities than is the reimbursement required by Section 405(f).

Moreover, as both courts below held, even if the railroads were contractually protected against reimposition of passenger service responsibilities, Section 405(f) would be unaffected because providing pass rider benefits was never one of the railroads' legal or contractual responsibilities.

B. The court of appeals held that the railroads have a contractual right against having to subsidize Amtrak and that the reimbursement formula in Section 405(f) violates that right because it requires the railroads to pay more than the incidental costs of allowing the pass riders on board—for example, the



administrative costs of processing the reimbursements. The court of appeals' theory is clearly wrong.

First, as previously discussed, even if the RPSA or the Basic Agreement conferred contract rights binding against the United States, those rights would at most protect the railroads from having to operate passenger trains, not from having to make any payments that might contribute to Amtrak's survival. Moreover, requiring the railroads to pay one-fourth the ticket price does not subsidize Amtrak. Even the full ticket price is not enough to cover Amtrak's costs, since Amtrak has been operating at a loss and has required continual federal subsidies. The court of appeals' conclusion that any reimbursement in excess of incremental costs would be a "windfall" for Amtrak (J.S. App. 9a-10a) was based on the erroneous premise that "passholders occupy seats that would otherwise be empty." In fact, however, some percentage of those seats would be filled because some passholders would undoubtedly purchase full-fare tickets if the pass rider privileges were not available. Estimating the value of the pass rider privileges is difficult in the absence of a market for tickets with comparable restrictions. But as suggested by the Government Accounting Office's detailed study of the question, the rate contained in Section 405(f) is reasonable and fair.

## III.

Finally, even if Section 405(f) altered contract rights, it would not offend the Due Process Clause. Federal laws "'adjusting the burdens and benefits of economic life'" violate due process only if "'the legislature has acted in an arbitrary and irrational way.'" *Pension Benefit Guaranty Corp.* v. *R.A. Gray*

*& Co.*, No. 83-245 (June 18, 1984), slip op. 10-11, quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Here, Congress rationally required Amtrak to honor the pass rider privileges of the railroads' employees and retirees and their dependents because the railroads had created an expectation that those privileges would be honored, because labor peace might have otherwise been threatened, and because the railroads themselves strongly urged that the privileges be honored. Congress rationally required the railroads to pay at least part of the cost of the privileges because Congress felt that the railroads were responsible and that the taxpayers should not have to bear the full burden. And Congress rationally concluded, in light of the GAO study, that requiring reimbursement at the rate of approximately one-fourth the ticket price was reasonable and fair to the railroads.

## ARGUMENT

### SECTION 405(f) OF THE RAIL PASSENGER SERVICE ACT DOES NOT UNCONSTITUTIONALLY IMPAIR ANY CONTRACTUAL RIGHT OF THE RAILROADS

### I. THE RAILROADS DO NOT HAVE A CONTRACTUAL RIGHT TO BE FREE OF THEIR PRIOR RESPONSIBILITIES FOR PROVIDING INTERCITY RAILROAD PASSENGER SERVICE

In the lower courts, the railroads argued that both the Rail Passenger Service Act and their Basic Agreement with Amtrak gave them a contractual right to be free of any responsibility related to the provision of intercity railroad passenger service. Disavowing or abandoning any argument based on the Commerce



Clause (see J.S. App. 19a) or the Takings Clause,[6] the railroads conceded that Section 405(f) is constitutional unless they possess such contractual rights. It is clear, however, that neither the RPSA nor the Basic Agreement confers such rights.

#### A. The RPSA Is Not A Contract

1. The Rail Passenger Service Act, 45 U.S.C. 501 *et seq.*, is a public law designed to provide the American public with a "modern, cost-efficient, and energy-efficient intercity railroad passenger service" (45 U.S.C. 501(a)). It is not a contract between the United States and the railroads or anyone else.

The federal and state governments enter into numerous contracts, but those contracts seldom take the form of statutes. Construing a statute to be a contract often restricts the exercise of legitimate and important governmental powers, and accordingly there is a strong presumption that legislation "is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dodge* v. *Board of Education*, 302 U.S. 74, 79 (1937). Accord, *Wisconsin & Michigan Ry.* v. *Powers*, 191 U.S. 379, 387 (1903); *Rector of Christ Church* v. *County of Philadelphia*, 65 U.S. (24 How.) 300, 302 (1860). See *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 17 n.14 (1977).

This presumption is particularly strong where it is claimed, as it is in the present case, that government has not merely incurred a commercial obligation, such as the payment of money[7] or conveyance of

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[6] See Plaintiffs' Reply Memo. in Support of Motion for Summary Judgment 12 (no Takings Clause issue raised). Nor was any such issue raised on appeal.

[7] See, *e.g.*, *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977) (issuance of bonds); *Perry* v. *United States*, 294

property,[8] but has bartered away important governmental powers. For example, in *Wisconsin & Michigan Ry.* v. *Powers*, 191 U.S. 379, 387 (1903), Justice Holmes, writing for the Court, responded to a claim that a state had incurred a contractual obligation not to tax certain railroads:

> The broad ground in a case like this is that, in view of the subject matter, the legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy and providing for carrying it out it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefor it makes no promise to them. It simply indicates a course of conduct to be pursued, until circumstances or its views of policy change.

Indeed, there is considerable authority holding that there are certain powers that government cannot restrict by contract. For example, in *Pennsylvania Hospital* v. *City of Philadelphia*, 245 U.S. 20 (1917), a state law was passed that forbade construction of any streets through the grounds of a hospital without its consent. In return, the hospital was required to make certain payments and to furnish ground for designated streets. Nevertheless, this Court held that the city was not barred from condemning part of the

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U.S. 330 (1935) (issuance of bonds); *Lynch* v. *United States*, 292 U.S. 571 (1934) (issuance of War Risk Insurance); *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95 (1938) (employment contract).

[8] See, *e.g.*, *United States* v. *Northern Pacific Ry.*, 256 U.S. 51 (1921) (land grant); *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87 (1810) (land grant).



hospital grounds for a street. The Court wrote (*id.* at 23):

> States cannot by virtue of the contract clause be held to have divested themselves by contract of the right to exert their governmental authority in matters which from their very nature so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties.

See also, *e.g.*, *Norman* v. *Baltimore & O.R.R.*, 294 U.S. 240, 309-310 (1935); *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 436-437 (1934); *Atlantic Coast Line R.R.* v. *City of Goldsboro*, 232 U.S. 548 (1914); *Illinois Central R.R.* v. *Illinois*, 146 U.S. 387 (1892); *Butchers' Union Co.* v. *Crescent City Co.*, 111 U.S. 746 (1884).

2. In the present case, the presumption that a statute does not create contractual rights and obligations has not been overcome. By its terms, the RPSA clearly does not create or speak of a contract between the United States and the railroads. See J.S. App. 17a; compare *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 105 (1938). Instead, the relationship between the United States and the railroads is described in non-contractual terms. Section 401(a), 45 U.S.C. 561(a), states that upon entering into one of the prescribed contracts with Amtrak, a participating railroad "shall be relieved of all its responsibilities as a common carrier of passengers by rail in intercity rail passenger service" under the Interstate Commerce Act and any other laws. This is the language of regulation under the Commerce Clause and not the language of contract.

To be sure, there are frequent references in Section 401(a), 45 U.S.C. 561(a), to contracts between the railroads and Amtrak. However, this Court has recognized that legislation establishing the terms on which other parties may execute contracts does not itself constitute a statutory contract but is rather merely a declaration of legislative policy that is subject to revision or repeal in the discretion of the legislature. *Dodge* v. *Board of Education*, 302 U.S. at 79.

Any remaining doubt about the meaning of Section 401(a) is dispelled by Section 301, 45 U.S.C. 541, under which Congress "expressly reserved" its rights to "repeal, alter, or amend [the RPSA] at any time." A "contract" that Congress may unilaterally repeal, alter, or amend at any time is no contract at all.*

This principle was recognized long ago in the *Sinking-Fund Cases*, 99 U.S. 700 (1878), where rail-

* The railroads contend that this section was "intended to insure that Congress could make future modifications in the *corporate charter* of Amtrak without giving rise to an action for impairment of contract by *Amtrak*. It had nothing to do with the separate contractual undertaking between the United States and the railroads pursuant to Section 401(a) and the Basic Agreements." Brief of Appellants in the court of appeals 22 n.20 (emphasis in original). This argument ignores the plain language of the statute and defies common sense. Section 301 speaks of the right to repeal, alter, or amend the Act—not merely Amtrak's corporate charter. Moreover, the railroads' contention would preclude Congress from making any modifications in Amtrak's corporate charter that might have an effect upon the terms of the Basic Agreements. If Congress had intended to so limit its express reservation of a right to "repeal, alter, or amend," it would have chosen far less sweeping language to accomplish such a narrow purpose.



roads challenged an act of Congress that amended prior statutes governing their obligations to the United States on securities issued to aid in the initial construction of the railroads. Rejecting the railroads' claim that the amendment "improperly interfere[d] with vested rights," (*id.* at 719), the Court held that by using "the simple words * * * 'that Congress may at any time alter, amend, and repeal this act,' * * * Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power" (*id.* at 720).

Just such "simple words" were employed by Congress in the Rail Passenger Service Act. They fully authorized and contemplated changes such as the 1979 and 1981 pass rider amendments.

3. In addition to the language of the RPSA, the nature of the contractual right that Congress allegedly bartered away—its power to impose certain common carrier obligations under the Commerce Clause—weighs heavily against the railroads' position. The regulation of interstate commerce is one of Congress's broadest and most important powers, and it should not lightly be presumed that Congress contracted away any portion of this vital authority.

Similarly, the prior regulatory relationship between the government and the railroads and the economic background of the RPSA are incompatible with the railroads' claim that Congress gave them the contractual right to be free of certain common carrier obligations. "One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the accept-

ance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss." *Chesapeake & O. Ry.* v. *Public Service Comm'n*, 242 U.S. 603, 607 (1917). A railroad may be compelled, among other things, to continue unprofitable service (see *Hayfield Northern R.R.* v. *Chicago & North Western Transportation Co.*, No. 82-1579 (June 12, 1984), slip op. 4), to construct expensive new facilities (*Atchison Ry.* v. *Railroad Comm'n*, 283 U.S. 380 (1931)); and to undertake new service (*Chesapeake & O. Ry.* v. *Public Service Comm'n, supra*).

When the RPSA was enacted in 1970, many of the passenger lines were "operating under heavy and continuing deficits." H.R. Rep. 91-1580, 91st Cong., 2d Sess. 3 (1970). More than one-fifth of the existing passenger trains were the subject of petitions for discontinuance before the Interstate Commerce Commission. *Ibid.* If the RPSA had not been enacted, most of the railroads would have faced bleak prospects. At best, they could have anticipated lengthy, costly, and hotly contested discontinuance proceedings (see *Hayfield Northern R.R.* v. *Chicago & North Western Transportation Co.*, slip op. 4) while losses attributable to passenger service mounted. At worst, discontinuance might have been denied by the ICC. See, *e.g.*, *New Haven Inclusion Cases*, 399 U.S. 392, 406 (1970) (ICC required New Haven Railroad to continue passenger service although "'totally lacking any hope • • • for future survival of this carrier'"); *Penn-Central Merger Cases*, 389 U.S. 486, 507 (1968).



The RPSA gave the railroads the same relief that might have been obtained through discontinuance petitions, but it eliminated the uncertainty and costly delay that would have otherwise occurred. Congress relieved the railroads of the portion of their common carriers obligations relating to passenger service, but the railroads did not obtain any contractual guarantee that Congress, acting under its Commerce Power, would not reimpose all or part of those obligations in the future if the railroads continued to operate freight service in interstate commerce. See *Chesapeake & O. Ry.* v. *Public Service Comm'n, supra* (railroad operating freight service may be required to initiate passenger service as well).

In light of the railroads' plight prior to the RPSA, it is far-fetched to suggest that the Act gave them anything other than welcome regulatory relief. One would expect Congress to have acquired some valuable consideration if, as the railroads maintain, Congress gave them the enforceable contractual right to be free in perpetuity from any obligation to provide any passenger service, while at the same time retaining their potentially profitable freight monopolies. In fact, however, the railroads relinquished little. Instead of shouldering huge annual losses resulting from passenger operations, the railroads were required to pay Amtrak an amount equal to 50% of their passenger service deficit during the preceding year, 45 U.S.C. 561(a)(2). This sum was almost certainly less than the loss a railroad would have otherwise occurred during the pendency of discontinuance proceedings. The railroads were also required to provide operational assistance and facilities to Amtrak at rates to be set by contract or, in the case of disagreement, by the ICC (45 U.S.C.

562). This, however, was a normal incident of the railroads' continuing obligations as common carriers. See, *e.g.*, 49 U.S.C. 11101. Finally, the railroads were required to enter into "fair and equitable arrangements to protect the interests of employees * * * affected by a discontinuance of intercity rail passenger service" (45 U.S.C. 565(a)). However, even if the RPSA had not been enacted, similar conditions might well have been attached to certificates allowing abandonment of rail service. *ICC* v. *Railway Labor Ass'n*, 315 U.S. 373 (1942); see 49 U.S.C. 10903(2). In sum, the net effect of the RPSA was to relieve the railroads of an immense and potentially fatal burden more quickly and more cheaply than would otherwise have been possible. On the other side, the federally subsidized National Railroad Passenger Corporation was given the opportunity to run passenger lines that had been—and continue to be—unprofitable. This was no contract but the gratuitous provision of regulatory relief.

### B. The Basic Agreement Between Amtrak and the Railroads Did Not Grant the Railroads the Contractual Right to be Free From All Obligation to Provide Passenger Service

Unlike the RPSA, the Basic Agreement is a contract. But it is a contract between the railroads and Amtrak, not the government.[10] Since Amtrak could not possibly bargain away any portion of Congress's Commerce Clause power, any argument that relies solely on the Basic Agreement and not the RPSA faces an immediate (and insurmountable) obstacle.

[10] Amtrak is not even a government agency, but a for-profit corporation that is "not be an agency or establishment of the United States Government" (45 U.S.C. 541).



The railroads tried to circumvent this obstacle in the lower courts by contending that Congress made Amtrak its agent and delegated to Amtrak the authority to confer upon railroads entering into the Basic Agreement the contractual right to be free of any obligation to provide passenger service. See Appellants Brief in the court of appeals 22, 26-28. This fiction, however, adds nothing to an argument based exclusively on the RPSA. Only Congress could conceivably confer a contractual right against the imposition of common carrier obligations. Thus, whether it is claimed that Congress conferred that right directly in the RPSA or indirectly through an agent, the source of the right must ultimately be the RPSA. And as already shown, the RPSA merely extended regulatory relief.

Both of the courts below suggested that the Basic Agreement gave the railroads a contractual right against future passenger service obligations, but the courts' reasoning was flawed. The district court correctly held (J.S. App. 17a) that the RPSA is not a contract but then erroneously stated in dictum that "[t]he Basic Agreement may well constitute a contract between the United States and the railroads." The court reached this conclusion because it believed that the Basic Agreement granted the railroads something—viz., "relie[f] * * * from their responsibility to provide passenger rail service"—"that only the United States, if anyone at all, can offer" (*id.* at 18a (footnote omitted)).

The district court was wrong on several scores. First, the United States was not a party to the Basic Agreement and is therefore not bound by it. Second, while there is no doubt that the railroads were relieved from their passenger service responsibilities, that relief, as previously shown, was furnished by

the RPSA and was provided as a matter of regulatory grace, not contractual right.

The court of appeals took a different but equally erroneous approach. The court found (J.S. App. 8a) that the Basic Agreement gave the railroads contractual protection against having to subsidize Amtrak and reasoned that Section 405(f) "authorizes Amtrak to breach the basic agreement." But the court never explained how Amtrak, by entering into the Basic Agreement, could bargain away Congress's power to enact a statute that the court conceded (J.S. App. 9a) was "a legitimate exercise of the commerce power."

In concluding that the Basic Agreement gave the railroads a contractual right against having to subsidize Amtrak, the court of appeals may have been misled by the language of Section 2.1 of the Basic Agreement, which states in part that "[f]rom and after May 1, 1971, Railroad shall be relieved of its entire responsibility for the provision of Intercity Rail Passenger Service." Of course, even if the Basic Agreement had purported to abrogate the railroads' common carrier obligations, it could not possibly have done so. It is apparent, however, that the Basic Agreement did not attempt to exercise such governmental powers but merely stated that the transfer of those obligations from the railroads to Amtrak, which would be provided under the RPSA as a matter of regulatory grace, was the purpose of the Basic Agreement and perhaps a condition of its performance. See Restatement (Second) of Contracts §§ 224-230 (1981). Other language in Section 2.1, which the court of appeals ignored, shows that the contracting parties recognized that only government could lift the railroads' common carrier responsibilities. The second paragraph of Section 2.1 states:



> If, having fully complied with the notice or other provisions of Section 401(a)(1) of the Act, Railroad is required, because of any order of any Federal, State or local court or agency of government, whether or not such order is lawfully issued, to continue or resume operation of any Intercity Rail Passenger Train beyond April 30, 1971, NRPC and Railroad will cooperate in efforts to effectuate discontinuance thereof.

## II. EVEN IF THE RAILROADS WERE CONTRACTUALLY RELIEVED OF ANY RESPONSIBILITY FOR THE PROVISION OF PASSENGER RAIL SERVICE, THE PASS RIDER AMENDMENT DOES NOT IMPOSE ANY SUCH OBLIGATION UPON THEM

### A. Requiring Payment For the Use of Pass Privileges Does Not Constitute the Reimposition of Common Carrier Obligations

Even if the RPSA or the Basic Agreement gave the railroads contract rights against the United States, those rights have nothing to do with this case. The railroads have taken language from the RPSA and the Basic Agreement out of context and have grossly distorted its meaning. Under the RPSA and the Basic Agreement, a participating railroad was "relieved of all its responsibilities as a common carrier of passengers by rail" under the Interstate Commerce Act and state law (45 U.S.C. 561(a)). Elsewhere, the Act[11] and the Basic Agreement[12] use

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[11] Another portion of Section 401(a), 45 U.S.C. 561(a), speaks of relieving a railroad of "its entire responsibility for the provision of intercity rail passenger service."

[12] Section 2.1 of the Basic Agreement states that a participating railroad is "relieved of its entire responsibility for the provision of Intercity Rail Passenger Service." See J.S. App. 2a.

slightly different language, but the meaning is the same. The railroads no longer had to operate passenger trains and incur the huge resulting losses. This relief had nothing to do with reimbursement for rides taken by pass holders.

In the first place, the railroads in this case have alleged that they never had a contractual or legal "responsibility" to provide free passes or reduced fares for their employees and their dependents. They claim that these benefits were provided gratuitously —like "'Christmas turkey[s],'" as the railroads put it (J.S. App. 18a). For this reason, both of the courts below correctly held that Section 405(f) was not affected by provisions relieving the railroads from "responsibilities" relating to the provision of passenger service.

More fundamentally, requiring the railroads to make reimbursement for the use of pass privileges on Amtrak does not constitute the reimposition of common carrier obligations. Contrary to the railroads' suggestion, the RPSA and the Basic Agreement did not relieve the railroads from the obligation to provide any type or degree of support for passenger operations. Quite to the contrary, Congress explicity imposed upon the railroads various responsibilities relating to the provision of rail passenger service by Amtrak. Contracting railroads must provide Amtrak with equipment, track, personnel, services, and facilities. 45 U.S.C. 545, 562. Congress was particularly concerned that the railroads make "fair and equitable arrangements to protect the interests of employees" who might be adversely affected by a discontinuation of intercity rail passenger service, and Congress therefore specified certain protections and benefits for them. 45 U.S.C. 565(b); Basic Agreement App. C-1. In addition, two years after the Act went into effect, Congress required the contracting railroads to give Amtrak's passenger trains the right of way over their own freight trains in the use of their tracks, junctions, and crossings. 45 U.S.C. 562(e)(1). All of these measures imposed on the railroads responsibilities far more directly and closely connected to the provision of passenger service than is Section 405 (f).



Finally, even if the railroads had been relieved of any responsibility even remotely related to *the operation* of passenger trains, Section 405(f) would still not be affected. Paying for someone's train ticket—and that in essence is all that Section 405 (f) requires—is a far cry from running or helping to run a passenger railroad.[12]

### B. The Reimbursement Formula In 45 U.S.C. 565(f) Does Not Result In a Subsidy Or Windfall For Amtrak

The court of appeals rejected the railroads' claim that reimbursement for pass rider privileges was the same thing as the reimposition of common carrier obligations (J.S. App. 4a, 6a n.4). Instead, the court appears to have begun from the premise that the RPSA and the Basic Agreement protect the rail-

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[12] As previously explained (pages 26-29, *supra*), we do not see how the Basic Agreement between Amtrak and the railroads may create contractual rights against the United States. But if it does, Section 7.5 of the Basic Agreement refutes any claim that those rights are violated by requiring the railroads to reimburse Amtrak for the use of pass privileges. That provision states that "[t]ransportation privileges, if any, with respect to business and personal travel of Railroad personnel shall be as determined by [Amtrak]." And unlike other paragraphs of Section 7.5, this provision does not allocate costs, thus leaving the question open for resolution by subsequent contract or statute.

roads from any requirement to subsidize Amtrak (*id.* at 8a). The court then reasoned that any payment in excess of "the costs of the passes" would constitute a subsidy or a "windfall" for Amtrak (*id.* at 10a). The court defined this "windfall" as the "amount in excess of what the railroads would have expended had they provided the 'pass privileges" (*ibid.*). The court's reasoning, including its economic theory, does not make sense.

First, the court of appeals' premise was wrong. As previously explained, the RPSA merely relieved the railroads from their common carrier obligation to operate passenger lines, not from any measure that might contribute to Amtrak's financial well-being. If Congress chose to levy a tax on the railroads, while simultaneously subsidizing Amtrak by an equivalent amount, the RPSA and the Basic Agreement would pose no obstacle.

Moreover, there is no basis for the court of appeals' conclusion that the statute requires the railroads to pay Amtrak more than the value of the transportation furnished to pass holders. The court of appeals appears to have concluded (see J.S. App. 10a) that the value of the pass privileges was equal to the incremental costs of allowing the pass riders on board. These costs include such items as the administrative cost of issuing tickets, the extra fuel used as a result of the added weight, additional towels in the lavatory, and wear and tear on the trains' furnishings. See GAO Report 14. The court reasoned that "passholders occupy seats that would otherwise be empty." (J.S. App. 10a). This is clearly not true. If the pass rider privileges were cancelled, some of the pass riders would undoubtedly purchase full-fare tickets. Surely all of them would not stay home or use other forms of transportation.



Determining the true value of the pass rider privileges is not easy. In a free market, the value of the transportation obtained by the pass holders would be the price of a ticket with comparable restrictions. However, railroad passenger transportation is not a free market. It is heavily subsidized by the government, so that even the cost of a full-fare ticket is less than what Amtrak would have to charge if it were economically self-sufficient. In addition, Amtrak does not sell tickets with restrictions comparable to those imposed on pass holders. It is therefore hard to estimate, among other things, how many such tickets could be sold and how many of those tickets would be purchased by persons who now buy regular tickets.

Before amending Section 405(f) in 1981, Congress requested the GAO to determine the value of the pass privileges, but the GAO was unable to arrive at a firm figure. The GAO concluded (GAO Report 27-28):

> [W]e could not arrive at a definitive value of the service. The value of service provided regular passengers may be considered to be the amount they are willing to pay for it; that is, the price of the ticket. The value of the service to pass riders probably would be something less because of the restrictions placed on pass riders and the uncertainty about getting on the train they want. However, how much the value would be reduced could vary from pass rider to pass rider and from situation to situation.
>
> * * * * *
>
> Although Amtrak and the railroads had not placed a specific value on the service to pass riders, Amtrak now receives half fares from all

non-public-law pass riders and from public law riders traveling off their home lines. In addition, Amtrak receives half fares from some pass riders when they travel on their home lines. Before Amtrak took over, the railroads also generally received half fares from other railroads' employees traveling on their lines.

Like the GAO, the sponsors of the House bill regarding the 1979 amendments to the RPSA felt that it was reasonable to require the railroads to reimburse Amtrak for one-half the price of the transportation furnished to the passholders, and they therefore required reimbursement for 50% of the "system-wide average monthly yield per revenue passenger mile." H.R. Rep. 96-189, 96th Cong., 1st Sess. 48 (1979). In conference, that rate was reduced to the 25% rate in the present statute. H.R. Conf. Rep. 96-481, 96th Cong., 1st Sess. 32-33 (1979). This figure is an eminently fair estimate of the value of the pass rider priveleges and may well be far less than their true worth. It should not have been overturned, especially on the basis of the court of appeals' simplistic economic analysis. Estimating the value of the pass rider privilege is a matter on which Congress and the GAO have far greater expertise than the courts, and their judgments should have been given more respect. Unlike the court of appeals, the district court here correctly declined to second-guess Congress on the particular rate of reimbursement it chose (J.S. App. 27a). As this Court observed in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 18-19 (1976), in refusing to overturn Congress's evaluation of an analogous cost issue:



> We are unwilling to assess the wisdom of Congress' chosen scheme * * *. It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension.

The railroads here ask this Court to "reweigh the evidence and substitute [its] judgment for that of Congress," a task the Court has previously held it "must decline to do." *Kleppe* v. *New Mexico*, 426 U.S. 529, 541 n.10 (1976). Accord, *National Ass'n of Greeting Card Publishers* v. *USPS*, No. 81-1304 (June 22, 1983), slip op. 15 (citation omitted) ("'[a]llocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science.'").

## III. SECTION 405(f) IS CONSTITUTIONAL EVEN ASSUMING THAT IT SOMEHOW ALTERS THE RAILROADS' CONTRACTS

Assuming, *arguendo*, that Section 405(f) somehow altered the railroads' contractual rights, due process was not violated. This Court's decision last Term in *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.* (*PBGC*), No. 83-245 (June 18, 1984), is completely dispositive of the railroads' due process/contract impairment claim. There, an employer argued that an amendment to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001 *et seq.*, violated the Due Process Clause because it impaired the employer's rights under a collective bargaining agreement by retroactively imposing financial liability for withdrawing from a multi-employer pension plan. This Court upheld the constitutionality of the amend-

ment on grounds that are fully applicable here. Like the court of appeals' decision in this case (see J.S. App. 9a-10a), the court of appeals' decision in *PBGC* was based on the Seventh Circuit's analysis in *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 592 F.2d 947 (1979), aff'd, 446 U.S. 359 (1980). But the Court in *PBGC* specifically rejected "the constitutional underpinnings" of the Seventh Circuit's analysis in *Nachman* (*PBGC*, slip op. 9 n.6). The *PBGC* Court also made clear (*id.* at 14-15) that principles developed under the Contract Clause may not be mechanically applied when reviewing federal economic legislation under the Due Process Clause:

> We have never held, however, that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibitions existing against state impairments of preexisting contracts. See, *e.g.*, *Philadelphia, Baltimore & Washington Railroad* v. *Schubert*, 224 U.S. 603 (1912). Indeed, to the extent that recent decisions of the Court have addressed the issue, we have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses. See *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 17, n.13 (1977). And, although we have noted that retrospective civil legislation may offend due process if it is "particularly 'harsh and oppressive,'" *ibid.* (quoting *Welch* v. *Henry*, 305 U.S. 134, 147 (1938), and citing *Turner Elkhorn*, *supra*, at 14-20), that standard does not differ from the prohibition against arbitrary and irrational legislation that we clearly enunciated in *Turner Elkhorn*.



Instead, the Court observed (*PBGC*, slip op. 10) that "[t]he starting point for analysis is [the] decision in *Usery* v. *Turner Elkhorn Mining Co.* [, *supra*]." The Court applied the following standard of review taken from that decision (*PBGC*, slip op. 10-11, quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 15):

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. See, *e.g.*, *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 487-488 (1955).

Section 405(f) easily passes this test. Congress clearly was not acting in an "arbitrary or irrational way" when it detemined that the railroads should pay for at least a portion of the value of the free or reduced-rate transportation furnished to their employees and retirees and their dependents. The railroads originally created the expectation that these privileges would be continued, and when Amtrak proposed to curtail them, the railroads strongly opposed such measures, arguing that employee morale and labor peace would be undermined. Amtrak's general passenger service is heavily subsidized by the taxpayers. Thus it was entirely reasonable for Congress to conclude that the railroads should pay for at least a small portion of the pass rider privileges extended at the railroads' request and to satisfy the expectations that the railroads created. The railroads may no longer fear that curtailment of pass privileges will

result in diminished employee morale or labor unrest, since the number of current employees enjoying those privileges has decreased. But that, in our judgment, does not diminish the rationality of the legislation that the railroads themselves once urged upon Congress. The particular reimbursement formula chosen by Congress is also entirely reasonable, as the detailed GAO report and our prior discussion (see pages 32-35, *supra*) show.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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# APPELLEE'S

# BRIEF

Nos. 83-1492 and 83-1633

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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**NATIONAL RAILROAD PASSENGER CORPORATION,**
*Appellant, Cross-Appellee,*

v.

**ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY,**
**BURLINGTON NORTHERN INC.,**
**CHESAPEAKE AND OHIO RAILWAY COMPANY,**
**BALTIMORE AND OHIO RAILROAD COMPANY, and**
**UNION PACIFIC RAILROAD COMPANY,**
*Appellees, Cross-Appellants.*

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**On Appeal from the United States Court of Appeals for the Seventh Circuit**

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## BRIEF OF RAILROAD APPELLEES, CROSS-APPELLANTS

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## QUESTIONS PRESENTED

1. Does the "entire responsibility for the provision of intercity rail passenger service", from which the Railroads were relieved by Section 401(a)(1) of the Rail Passenger Service Act ("RPSA") and contracts entered into by the Railroads and Amtrak thereunder in 1971, include financial responsibility for free and reduced-rate intercity rail passenger service which Congress has subsequently required Amtrak to provide to certain Railroad employees and their dependents, thereby rendering 1979 and 1981 amendments to Section 405(f) of the RPSA, which purport to impose such a financial responsibility on the Railroads, an unconstitutional impairment of the Railroads' contractual rights?

2. Are the 1979 and 1981 amendments to Section 405(f) unconstitutional because (a) they require the Railroads to pay Amtrak amounts in excess of the cost of providing rail passenger service to such employees and dependents, thus impairing the Railroads' release by compelling them to subsidize Amtrak's intercity rail passenger service to the public, and (b) they require the Railroads to pay amounts to Amtrak not reasonably related to the service provided to such employees and dependents?

3. Should the 1979 and 1981 amendments to Section 405(f) be construed so as not to impose any financial responsibility on the Railroads, thereby avoiding any constitutional issue?

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The Statement required by Supreme Court Rule 28.1 is set forth at pages 11-15 of the Jurisdictional Statement on Cross Appeal in No. 83-1633.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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**NATIONAL RAILROAD PASSENGER CORPORATION,**

*Appellant, Cross-Appellee,*

v.

**ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, BURLINGTON NORTHERN INC., CHESAPEAKE AND OHIO RAILWAY COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, and UNION PACIFIC RAILROAD COMPANY,**

*Appellees, Cross-Appellants.*

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**On Appeal from the United States Court of Appeals for the Seventh Circuit**

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## BRIEF OF RAILROAD APPELLEES, CROSS-APPELLANTS

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### BASIS FOR JURISDICTION

The judgment of the Court of Appeals to which these appeals relate was entered on December 13, 1983. Appellant cross-appellee National Railroad Passenger Corporation ("Amtrak") filed a Notice of Appeal with the United States Court of Appeals for the Seventh Circuit on January 10, 1984 and filed its jurisdictional statement in No. 83-1492 ("Amtrak J.S.") on March 9, 1984. The five appellee cross-appellant railroads ("Railroads") docketed a timely cross-appeal pursuant to Supreme Court Rule 12.4 by filing a jurisdictional statement in No. 83-1633 on April 6, 1984.

In their Motion to Dismiss or Affirm in No. 83-1492, dated May 18, 1984, the Railroads argued that the decision below was based on nonconstitutional grounds, and that therefore jurisdiction of Amtrak's appeal did not lie under 28 U.S.C. §1252. Given that this Court has noted probable jurisdiction in No. 83-1492, 105 S. Ct. 76 (1984), the Railroads will assume that the constitutional issues raised below are in fact presented by the decision of the Court of Appeals, and are properly before this Court. However, as argued in Part V of this brief, they continue to urge that the decision below can and should be affirmed on nonconstitutional grounds.

This Court has postponed the question of jurisdiction in No. 83-1633. 105 S. Ct. 76 (1984). The Railroads filed this cross-appeal because, although they believe they are entitled to argue the question presented by the cross-appeal in defense of the judgment below in No. 83-1492, reversal of the decision of the Court of Appeals on the question may entitle them to a broader measure of relief than the Court of Appeals granted. See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 n. 4 (1970); Supreme Court Rule 10.5. The decision of the Court of Appeals, while requiring entry of judgment in favor of the Railroads, also "affirmed in part" the judgment of the District Court (Amtrak J.S. at 29a), thereby apparently upholding in part the District Court's denial of the declaratory relief requested by the Railroads.[1]

Jurisdiction in No. 83-1633 is predicated upon 28 U.S.C. §1252. This Court has previously authorized the filing of cross appeals under 28 U.S.C. §1252, see *Regan v. Taxation with Representation of Washington*, ___ U.S. ___, 103 S. Ct. 1997, 1999 n.3 (1983), and has concluded that "when we have properly asserted jurisdiction under §1252, the whole case is to come before us." *Heckler v. Edwards*, ___ U.S. ___, 104 S. Ct. 1532, 1537-38 (1984). Assuming then that the Court properly has jurisdiction in No. 83-1492, it also has jurisdiction in No. 83-1633.

[1] In their complaint, the Railroads prayed for, among other things, a judgment under 28 U.S.C. §2201 "declaring that Amtrak has no right to obtain reimbursement from [Railroads] for providing free and reduced-rate rail transportation to present and retired employees of [Railroads] and their dependents." J.A. at 8.



The substantiality of the question presented by the cross-appeal is demonstrated by the arguments set forth in Part II of this brief.

## STATEMENT OF THE CASE

Prior to May 1, 1971, each of the five appellee cross-appellant Railroads provided intercity rail passenger service to the public. As an incident to this service, each Railroad had for many years allowed its employees and their families to travel free or for reduced fares on the passenger trains it operated; the Railroads did not, however, except in limited instances, provide free or reduced fare travel over lines of other railroads. These employee travel privileges (generally called "pass privileges") were offered only to the extent that space was available after accommodating other passengers, and whenever the Railroads discontinued passenger trains the pass privileges were diminished to that extent. The pass privileges granted by the Railroads were not required by any collective bargaining agreement, but the effect of eliminating those privileges was taken into consideration by the Interstate Commerce Commission in deciding applications under the Interstate Commerce Act for discontinuance of passenger trains (*see, e.g., Penn Central Co. Discontinuance of Trains Nos. 574 and 575*, 334 I.C.C. 312, 332 (1969)). Because of the "space available" nature of the pass privileges, the Railroads considered the cost of the privileges to be minimal. (Complaint and Answer, ¶4, J.A.

at 3, 15-16;[2] Affidavits of Ruegg (¶3), Farrell (p. 2), Howes (¶4), Davis (¶2) at R. 27; GAO Report, J.A. at 48, 64.)

By the late 1960s, rail passenger service had become unprofitable, and the Railroads and other railroads had instituted numerous proceedings with the Interstate Commerce Commission seeking discontinuance of passenger trains. In order to avoid the threatened cessation of all or most rail passenger service, Congress enacted the Rail Passenger Service Act of 1970 ("RPSA"). The RPSA created a new federal corporation—Amtrak—and offered to the railroads a means by which they could be contractually relieved of their responsibility for intercity rail passenger service. (H.R. Rep. No. 91-1580, 91st Cong., 2d Sess. 2, 3 (1970).)

Section 401(a)(1) of the RPSA, 45 U.S.C. §561(a)(1), provided that upon the request of a railroad, Amtrak was "authorized" to enter into a "contract" (subsequently called the "Basic Agreement") which would "relieve the railroad, from and after May 1, 1971, of its entire responsibility for the provision of intercity rail passenger service." The RPSA went on to provide, in Section 401(a)(2), 45 U.S.C. §561(a)(2), that "[i]n consideration of being relieved of this responsibility," a railroad was to pay Amtrak certain sums of money. The RPSA further provided, in Section 402, 45 U.S.C. §562, that the railroads were to contract with Amtrak to provide tracks, facilities and services to Amtrak, for which they were to be paid "just and reasonable" compensation; and in Section 405(a), 45 U.S.C. §565(a), that they were to provide arrangements to protect the interests of employees affected by a discontinuance of intercity rail passenger service. Approval of the latter arrangements by the Secretary of Labor was

[2] References herein to "Complaint and Answer" include the essentially identical allegations and answers with respect to all of the Railroads, although only those with respect to Atchison, Topeka and Santa Fe Railway Co. are set out in the Joint Appendix.



required by Section 405(b), 45 U.S.C. §565(b), as a precondition to the making of a contract under Section 401(a)(1).

Although not all railroads were willing to agree to the terms set forth in Section 401 of the RPSA, the five appellee-cross appellant Railroads did so. They entered into the Basic Agreement, paid consideration to Amtrak in the collective amount of $82.8 million, adopted labor protection arrangements approved by the Secretary of Labor, and discontinued all their intercity rail passenger operations (including pass privileges) as of April 30, 1971. On May 1, 1971, Amtrak commenced its rail passenger service, operating many of the routes discontinued by the Railroads as well as other routes. (Complaint and Answer, ¶¶5, 6, J.A. at 3-4, 16-17, and Ex. B Appendix C-1 at R. 1; Affs. of Ruegg (¶4), Farrell (p. 2), Howes (¶6), Davis (¶3) at R. 27; GAO Report, J.A. at 48.)

Section 7.5 of the Basic Agreement stated that "[t]ransportation privileges, if any, with respect to business and personal travel of Railroad personnel shall be as determined by [Amtrak]." When Amtrak commenced its rail passenger service, it voluntarily adopted its own program of pass privileges for railroad employees pursuant to this provision, for which it assumed the entire financial responsibility. (Complaint and Answer, ¶7, J.A. at 4-5, 17; Amtrak Brf. at 7-9.)

In 1972 Congress enacted Pub. L. No. 92-316, which added Section 405(f) to the RPSA. Section 405(f) required Amtrak to provide pass privileges over its entire system to railroad employees and their dependents who had pass privileges of any kind on April 30, 1971. It further provided that such privileges would apply only to the extent that space was available. Pursuant to this statute, Amtrak adopted a uniform policy that afforded either free or half-fare travel to such persons over the lines of their home railroad, and half-fare privileges over the lines of all other

roads.[3] (Complaint and Answer, ¶9, J.A. 5, 17; GAO Report, J.A. at 53-54.)

Section 405(f) as enacted in 1972 also required the railroads to pay for "such costs as may be incurred" by Amtrak in providing the mandatory pass privileges, and authorized the Interstate Commerce Commission to determine those costs if a railroad and Amtrak were unable to reach agreement as to the payment within ninety days. No such agreement was reached by any of the Railroads, and the matter was submitted to the Commission. The Commission found that the cost of the privileges, taking into account their "space available" nature, was $.00079 (less than one-tenth of a cent) per mile,[4] and that the half fares received by Amtrak from many statutory pass riders should be offset against this amount. *Determination of Cost Reimbursement Under Section 405(f) of the Rail Passenger Act*, ICC Finance Docket No. 27194, December 18, 1972, J.A. at 23-38 ("*Cost Reimbursement Decision*"). Such half fares have always exceeded the costs as determined by the Commission. (Complaint and Answer, ¶10, J.A. 5-6, 17-18; Affs. of Taylor (¶3), Deasey (¶3) at R. 27; GAO Report, J.A. at 64.)

By the late 1970's it was apparent to Congress that Amtrak had become a substantial drain upon the federal

[3] Contrary to the suggestions of Amtrak and the United States (Amtrak Brf. at 9-10; U.S. Brf. at 5-6), the record does not show that any of the five appellee cross-appellant Railroads sought the addition of §405(f) to the RPSA. The record shows only that Penn Central and Norfolk and Western complained of Amtrak's pass policies because of circumstances unique to those railroads. The Penn Central had apparently provided for passes in its collective bargaining agreement (*see Baker v. System Federation No. 1*, 331 F.Supp. 1363 (E.D. Pa. 1971)), and Norfolk and Western employees had been completely excluded from Amtrak's voluntary pass program (J.A. at 95-96).

[4] The United States erroneously refers to the cost as 0.79 cents per passenger mile. U.S. Brf. at 8. This should read 0.79 *mills* per passenger mile. See J.A. at 36.



treasury. The Senate Report on what became the Amtrak Reorganization Act of 1979 noted that in the seven years in which Amtrak had existed, the federal subsidy had increased to "the point where the Federal Government provides all of Amtrak's capital improvements funds, two-thirds of its operating funds and all of the funds required to repay $900 million in guaranteed loans." S. Rep. No. 96-183, 96th Cong., 1st Sess. 11 (1979). As a result, Congress enacted the Amtrak Reorganization Act of 1979, Pub. L. No. 96-73 (1979), which contained a number of measures aimed at reducing Amtrak's deficits. *Id.* at 7-9; *see also* H.R. Rep. No. 96-189, 96th Cong., 1st Sess. 30-31 (1979); H. Conf. Rep. No. 96-481, 96th Cong., 1st Sess. 3 (1979).

One of the provisions of the Amtrak Reorganization Act of 1979 was an amendment to Section 405(f) of the RPSA (the "1979 Amendment"). The 1979 Amendment substituted for the provision that Amtrak should receive the "costs" of the pass privileges provided under Sec. 405(f) a requirement that for the two-year period commencing on October 1, 1979, Amtrak should be "reimbursed" for the pass privileges by payments from the railroads in an amount equal to "25 per cent of the systemwide average monthly yield per revenue passenger mile" (*i.e.*, 25 per cent of average total revenues per mile over the Amtrak system) for each mile of pass travel. This payment requirement was to apply regardless of whether Amtrak provided the travel free of charge or collected a half fare for it. The Senate Committee Report on the 1979 Act stated (with respect to an earlier version of this payment requirement) that the new requirement "reflect[ed] revenue considerations rather than cost considerations." S. Rep. No. 96-183, *supra*, at 10.

The Amtrak Reorganization Act of 1979 also contained, in Section 120(b), a direction to the Comptroller General

to study the pass privileges provided under Section 406(f) and to submit a report "setting forth recommendations regarding the appropriate means for reimbursing [Amtrak] for the cost of providing such transportation services, taking into account the value of the services being provided." The General Accounting Office ("GAO") did submit such a report to Congress (set out in J.A. at 42-84) which concluded that fully allocated costs were "probably not a realistic basis" for reimbursement; that Amtrak "has not been able to identify and adequately document incremental costs that would not be offset by the pass riders' half fares"; that "the purpose of the space availability criteria . . . is to ensure that pass riders do not increase costs"; and that it "could not find adequate analytical evidence to establish whether Amtrak should be reimbursed for the value of the service it provides pass riders or for the incremental cost of providing the service." J.A. at 68, 64, 77, 80. The GAO Report did not take into consideration the release from all responsibility for intercity rail passenger service set forth in Section 401(a) of the RPSA and the Basic Agreement, nor did it comment on the propriety of requiring the same payment for each mile of half fare pass travel as for each mile of free pass travel.

In 1981 Congress enacted Pub. L. No. 97-35 (the "1981 Amendment"), which further amended Section 405(f) to make the payment requirement of the 1979 Amendment permanent. Commencing with the month of October 1979 Amtrak has collected from the Railroads pursuant to the payment requirement amounts which have exceeded 2 cents per mile for all employee pass travel covered by Section 405(f). In the first ten months these collections from the five Railroads exceeded $1 million. (Complaint and Answer, ¶¶12, 13, J.A. at 6-7, 18; see GAO Report, J.A. at 51.) To date they exceed $5 million.

In December 1980 the Railroads filed this action against Amtrak asserting that the payment requirement of the



1979 Amendment violated the Fifth Amendment because it impaired the rights which the Railroads had acquired under Section 401(a) of the RPSA and the Basic Agreement. The complaint alleged that pass privileges constituted "intercity rail passenger service" from which the Railroads had been relieved of their "entire responsibility," and that in addition the amounts of the required payments exceeded the cost of the pass privileges and therefore required the Railroads to subsidize intercity rail passenger service to the general public. J.A. at 7. The complaint further alleged that the payment requirement violated the Fifth Amendment apart from any impairment because the amounts of the required payments bore "no reasonable relationship to the services provided" in providing the pass privileges. J.A. at 9. The Railroads prayed for a money judgment for all sums paid to Amtrak under the 1979 Amendment and also a declaratory judgment that Amtrak had no right to reimbursement from the railroads for any pass privileges. J.A. at 8. The Railroads subsequently amended their complaint to make their claims applicable to the 1981 Amendment as well. J.A. at 102.

The Railroads filed a Motion for Summary Judgment, and Amtrak filed a Cross-Motion for Summary Judgment. J.A. at 22, 39. The United States intervened as a defendant under 28 U.S.C. §2403 and filed a Motion to Dismiss, or in the alternative, for Summary Judgment. J.A. at 101. Although concluding that the Basic Agreement "may well constitute a contract between the United States and the railroads" (Amtrak J.S. at 17a), the District Court held that any such contract had not been impaired and that the payment requirement was not "arbitrary or irrational" and therefore entered an order granting the summary judgment motions of Amtrak and the United States. Amtrak J.S. at 11a-27a.

The Railroads appealed the decision of the District Court to the Court of Appeals for the Seventh Circuit, and on December 13, 1983, the Court of Appeals entered its decision affirming in part and reversing in part. The Court of Appeals agreed with the District Court that employee pass privileges were not a part of the "intercity rail passenger service" from which the Railroads had been relieved of their "entire responsibility" on the ground that such privileges were not a "responsibility" of the Railroads. Amtrak J.S. at 6a-7a. It further held, however, that the payment requirement of the 1979 and 1981 Amendments "authorizes reimbursement beyond the costs of the passes" and "thereby transfers funds from the railroads to Amtrak, which funds Amtrak may in turn use to finance aspects of its operations that were once part of the railroads' entire responsibility for the provision of intercity rail passenger service." Amtrak J.S. at 8a. The 1979 and 1981 Amendments thus attempted "to take back part of what Congress authorized Amtrak to give in the basic agreement." Amtrak J.S. at 8a. The Court of Appeals also concluded that, because the payment requirement was the same for pass riders who paid half fares as for those who rode free, it "irrationally eliminates the offset for half fares." Amtrak J.S. at 10a. The Court of Appeals found no satisfactory reason "why Amtrak should realize a windfall, an amount in excess of what the railroads would have expended had they provided the pass privileges," and therefore held that the payment requirement of the 1979 and 1981 Amendments "unreasonably and illegally impairs the rights of the railroads under the basic agreement and may not be enforced." Amtrak J.S. at 9a, 10a.

The Court of Appeals decision requires entry of a judgment in favor of the Railroads for the monetary amounts claimed, and for a declaration that the payment requirement of the 1979 and 1981 Amendments may not be enforced against them, but apparently affirms the judgment against the Railroads on their prayer for a declaration that Amtrak has no right whatever to obtain reimbursement for pass privileges. Amtrak appeals in No. 83-1492 from that part of the decision in favor of the Railroads, and the Railroads cross-appeal in No. 83-1633 from that part of the decision against them.



## SUMMARY OF ARGUMENT

In the Rail Passenger Service Act, Congress, as part of a comprehensive solution to the financial crisis that was destroying the rail passenger service system, offered to relieve the railroads, from and after May 1, 1971, of their "entire responsibility for the provision of intercity rail passenger service" if they would pay certain "consideration" to Amtrak and enter into a certain "contract" with Amtrak. The Railroads paid Amtrak the required consideration in a total amount exceeding $80 million and entered into the required contract (the "Basic Agreement"), and Amtrak thereafter assumed the Railroads' responsibility for providing intercity rail passenger service. The RPSA and the Basic Agreements created an obligation on the part of the United States because the RPSA expressly "authorized" Amtrak to "contract" on its behalf, and because the promise they made to the Railroads—a release from the Railroads' entire intercity rail passenger responsibility—was one that only the United States could fulfill.

By 1979 Amtrak's deficits incurred in providing rail passenger service had assumed enormous proportions, and Congress passed the Amtrak Reorganization Act of 1979 in an attempt to reduce them. One of the deficit-reducing provisions was an amendment to Section 405(f) of the RPSA (subsequently reenacted in 1981), the effect of which is to require the Railroads to make additional

payments to Amtrak in excess of $1 million per year. Although the 1979 Amendment purports to require these payments as "reimbursement" to Amtrak for "space available" pass privileges which Amtrak is required to supply to certain railroad employees under Section 405(f), the payments in fact reduce Amtrak's deficit incurred in providing intercity rail passenger service to the public. The "costs" of the pass privileges were found by the Interstate Commerce Commission in 1972 to be less than one-tenth of one cent per mile, whereas the Railroads are required to pay more than twenty times that amount under the 1979 Amendment; moreover, Amtrak receives half-fares from many pass riders which wholly exceed its costs for all pass riders.

In light of the foregoing, the payment requirement of the 1979 and 1981 Amendments directly and seriously impairs the obligation of the United States in violation of the Fifth Amendment under the principles established by *Lynch v. United States*, 292 U.S. 571 (1934), and *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). The provision of free and reduced fare passenger service to railroad employees has historically been considered a necessary incident to providing public passenger service and squarely falls within the definition of "intercity rail passenger service," from which the Railroads were relieved of responsibility by the RPSA. In addition, as found by the Court of Appeals, the payment requirement forces the Railroads to pay amounts in excess of the incremental cost of the pass privileges, which amounts are directly allocable to the provision of intercity rail passenger service to the public, thereby impairing the Railroads' contractual rights even under the most restrictive interpretation of the RPSA and the Basic Agreements. Such impairment is not justified or otherwise excusable, inasmuch as Congress adopted the payment requirement purely to reduce its own subsidy of Amtrak, not due to any legitimate public policy need for such payments.



## ARGUMENT

### I.

### THE RELEASE FROM ALL RESPONSIBILITY FOR INTERCITY RAIL PASSENGER SERVICE IS A CONTRACTUAL OBLIGATION OF THE UNITED STATES PROTECTED BY THE FIFTH AMENDMENT.

#### A. The Fifth Amendment Strictly Limits The Power Of The Federal Government To Impair Its Own Contracts.

This Court has long recognized that valid contracts of the United States are protected by the Fifth Amendment. As Justice Brandeis stated for a unanimous Court in *Lynch v. United States*, 292 U.S. 571, 579 (1934):

> The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.

Amtrak and the United States do not deny that contract rights with the United States are constitutionally protected.[5] They appear to assert, however, that this Court should assess *any* federal impairment of contract by the same standards used to measure the constitutionality of retroactive social and economic legislation generally. Relying upon last Term's decision in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, ___ U.S. ___, 104 S. Ct. 2709 (1984), they claim the Federal Government may abrogate contractual rights whenever there is a "ra-

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[5] The principle that contractual obligations are "property" for Fifth and Fourteenth Amendment purposes has been widely followed. *See, e.g., United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n. 16 (1977); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 n. 12 (1978).

tional basis" for doing so. But the Court's language in *Pension Benefit*, which involved only private contractual rights, not the obligation of a government, was carefully qualified and did not suggest any such sweeping principle. *Id.* at 2719-2720. In particular, *Pension Benefit* does not cite, much less question, the decisions which establish that a much stricter standard of review is appropriate when the United States has impaired *its own* contractual obligations.

The existence of a stricter standard for assessing federal impairment of federal government obligations is conclusively demonstrated by the *Gold Clause Cases*, two decisions of this Court which involved a Congressional resolution of 1933 providing that all financial obligations payable in gold or equivalent value could be discharged by payment in paper money. As applied to private obligations containing covenants for payment in gold, the Court sustained the resolution on the basis of Congress' power to coin and regulate the value of money. *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240 (1935). But as applied to the United States' *own* obligations, the Court held in *Perry v. United States*, 294 U.S. 330, 350-51 (1935), that the resolution was unconstitutional:

> There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements . . . To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government.

In this one respect at least, the operation of the Fifth Amendment upon the federal government is quite similar



to that of the Contract Clause on state governments. This Court has held that impairments of a state government's own contracts "face more stringent examination" than do laws "regulating contractual relations between private parties." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 n. 15 (1978). See also *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412-413 n. 14 (1983).

There are at least two reasons why government impairment of its own obligations is treated differently than impairment of private obligations. First, as stated in *Lynch v. United States*, *supra*, 292 U.S. at 580, "Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors." Absent a rule of constitutional magnitude limiting the power of governmental units to abrogate their own contracts, many persons would simply refuse to loan money, sell supplies, relocate, or otherwise act in reliance upon the word of the government. At the very least, the *cost* to the government of inducing this sort of reliance by others would rise appreciably, because of the greater risk.

Second, as the Court observed in *United States Trust Co.*, *supra*, 431 U.S. at 26, public contracts stand on a different footing from private contracts because "the State's self-interest is at stake." When the government seeks to impair a private contractual obligation, it is not inappropriate to assume that the legislature functions as a neutral arbiter between two competing interests that have roughly equal access to the political process. See *United States v. Carolene Products Co.*, 304 U.S. 144, 153-54 n. 4 (1938). But when the government asserts the need to impair one of its own contractual obligations, the legislature cannot be presumed to function in a disinterested manner. See Comment, *A Process-Oriented Approach to the Contract Clause*, 89 Yale L. J. 1623, 1647-49 (1980). To avoid these difficulties, this Court has recog-

nized the bedrock constitutional principle, at both the state and federal level, that absent compelling circumstances "government must keep its word." L. Tribe, American Constitutional Law 470 (1978).[6]

### B. The Release From All Responsibility For Intercity Rail Passenger Service Is A Contractual Obligation Of The United States Of A Financial Nature.

The threshold inquiry in this case, therefore, is whether the Railroad's release from all responsibility for intercity rail passenger service is a contractual obligation of the United States. *See Keefe v. Clark*, 322 U.S. 393, 396 (1944). The United States asserts various technical arguments in an effort to show that the release is not its contractual obligation, but the realities underlying the enactment of the RPSA clearly establish that it is.

The contractual release from all responsibility for intercity rail passenger service was central to the entire concept of the RPSA. Under the Act, no railroad was compelled to relinquish passenger service obligations (and, in fact, some did not). A railroad's decision to do so was strictly voluntary, and was to be manifested by its election to enter into a contract (the Basic Agreement) with a newly-chartered federal corporation (Amtrak).

[6] In recognizing the principle that the United States may not generally abrogate its own contracts, this Court has sometimes relied upon the Takings Clause of the Fifth Amendment, *Lynch v. United States*, 292 U.S. 571, 579-81 (1934), and sometimes upon the Due Process Clause, *Lynch*, *supra* at 579; *Sinking-Fund Cases*, 99 U.S. 700, 718-19 (1878). Thus, the narrow claims presented by the Railroads in this case can be derived from either or both clauses of the Fifth Amendment. The Railroads have never "abandoned" their reliance on the Takings Clause, as suggested by Amtrak and the United States (Amtrak Brf. at 38; U.S. Brf. at 19.) This is not, however, a "taking" case like the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), involving unique property rights of uncertain value, which must be brought against the United States in the Claims Court pursuant to the Tucker Act, 28 U.S.C. Sec. 1491; it is inconceivable that Congress intended for the Railroads to pay money to Amtrak and then sue the United States to get it back. The payment requirement here is thus like the mortgage moratorium provisions of the Frazier-Lemke Act which were simply held unenforceable under the Takings Clause in *Louisville Joint Stock Bank v. Radford*, 295 U.S. 555 (1935).



The Act and the Basic Agreements are replete with references that make it plain the release was intended to be a contract. The Act, in §401(a)(1), states expressly that participating carriers were to receive "a *contract* to relieve the railroad, from and after May 1, 1971, of its entire responsibility for the provision of intercity rail passenger service" (emphasis supplied). In order to receive such a "contract," a carrier had to agree to pay "consideration" equal to 50% of its 1969 fully distributed passenger service deficit. RPSA, §401(a)(2). The Railroads here paid such "consideration," amounting in the aggregate to over $80 million. In return, they were allowed to enter into a written contract which stated, as its first substantive provision, that the Railroad "shall be relieved of its entire responsibility for the provision of Intercity Rail Passenger Service." Basic Agreement, Section 2.1, J.A. 13.[7] Where language of contract is used repeatedly in a statute creating a governmental obligation, and the parties perform acts consistent with a contractual intent, it must be presumed that "the word 'contract' was not

[7] The United States explains the appearance of the release in the Basic Agreements on the ground that it was a "condition of performance" by the Railroads. U.S. Brf. at 28. The "shall be relieved" language is wholly inconsistent with this contention. The second paragraph of Section 2.1 of the Basic Agreement, pledging Amtrak's cooperation in resisting efforts of any "Federal, State or local court or agency of government" to require a Railroad to resume passenger service after April 30, 1971, does not support the United States' argument; it simply requires Amtrak to assist the Railroads in the event of governmental action inconsistent with the release.

used inadvertently or in other than its usual legal meaning." *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 105 (1938).

Furthermore, although the Act specified that Amtrak was to be the signatory of the contract, the contract plainly was intended to give rise to an obligation of the United States. Amtrak's authority to bind the United States to this obligation is expressly set forth in the statute. Although Amtrak is not an official "agency" of the United States (RPSA, §301, 45 U.S.C. §541), Section 401(a)(1) of the RPSA expressly states that Amtrak "*is authorized* to contract . . . to relieve the railroad, from and after May 1, 1971, of its entire responsibility for the provision of intercity rail passenger service" (emphasis supplied). Moreover, the Act expressly states that the release includes, among other things, relief from responsibilities "under part I of the Interstate Commerce Act or any State or other law relating to the provision of intercity passenger service." RPSA, §401(a)(1). Amtrak concededly has no authority to preempt federal, state, and local statutory obligations. Only the United States, acting in its capacity as national sovereign, could grant such relief. If the United States were not bound by this promise, then the Basic Agreements would be illusory because Amtrak, the signatory, could not provide the consideration which is the linchpin of the entire RPSA concept.

The contractual obligation of the United States in this case is closely analogous to the statutory covenant with bondholders at issue in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), which this Court held to be a contractual obligation of a State subject to the Contract Clause. Here, as in *United States Trust Co.*, the government has not itself executed a written agreement setting forth its obligation, but rather has made certain affirmative promises in the course of legislation authorizing



some other entity—in this case Amtrak—to enter into express written agreements. Similarly, here as in *United States Trust Co.*, the government has by its statutory language evidenced a clear intent to be bound by a promise. And finally, here as there the government has received the benefit of its bargain: the overwhelming majority of the Nation's railroads were induced to provide initial capitalization in order to make Amtrak a reality.[8]

The United States asserts that the RPSA and the Basic Agreements do not represent a contractual obligation of the United States, but rather the "gratuitous provision of regulatory relief." U.S. Brf. at 26. In support of this argument the United States first invokes the notion that there are certain "reserved powers"—such as the power to regulate interstate commerce—which Congress cannot bargain away, although it can admittedly bind itself to a "commercial obligation, such as the payment of money or conveyance of property." *Id.* at 19-20. See *United States Trust Co. v. New Jersey*, *supra*, 431 U.S. at 21-25. According to the United States, the release from responsibility for intercity rail passenger service is a promise by Congress not to exercise its power to regulate interstate commerce, and hence is no promise at all.

Assuming *arguendo* the continued validity of the "reserved powers" doctrine, with its wooden distinction between the types of powers as to which the legislature may and may not bind itself, see *United States Trust Co.*, *supra*, 431 U.S. at 24 ("[s]uch formalistic distinctions perhaps cannot be dispositive"), the release cannot be

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[8] Alternatively, §401(a) can be viewed as a unilateral offer to contract by the United States which was accepted by the railroads when they entered into the Basic Agreements. *See Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938); *Marvel v. Dunnemann*, 490 F.Supp. 170 (D. Del. 1980).

characterized as a pledge not to regulate interstate commerce. There is nothing in the release which prohibits the United States from regulating the intercity rail passenger service provided by Amtrak in order to protect the health, morals or safety of the general public which rides on such trains, or the employees who operate such trains. Nor is there anything in the release which bars the Federal Government, acting pursuant to the Commerce Clause, from ordering Amtrak to provide pass privileges to railroad employees.

On the contrary, the release from all responsibility for intercity rail passenger service was a release from continuing *financial* obligations associated with passenger trains, not a release from the obligations attendant upon *operating* passenger trains. As stated in the Senate Report on the original version of the RPSA:

> Therefore, it is necessary for the Congress to enact a program to insure continued operation of essential passenger services; to provide for their near-term upgrading and modernization; and to relieve the railroad industry to a meaningful extent of the *onerous financial burden* of passenger operations. S. Rep. No. 91-765, 91st Cong., 2d Sess. 6 (1970) (emphasis supplied).

The RPSA did not in any way eliminate the Railroads' operating responsibilities; the Railroads continue to provide facilities and services to Amtrak for the transportation of passengers. What it did eliminate was the financial risks associated with operating responsibilities, substituting for enterprise liability the provision that a contracting railroad would receive "just and reasonable" compensation for its services. RPSA, §402. It would make nonsense of the Act and the concept of the release to construe it to mean that the Railroads no longer had to operate passenger trains, but that they could be required to absorb all of the deficits incurred by Amtrak in doing so. Such a release would make the Railroads worse off than



they were before—they would still be liable for all the deficits incurred in intercity rail passenger operations, but they would be at the complete mercy of Amtrak as to how large those deficits would be. The Railroads would never have entered into the Basic Agreement if this were what it meant. Affidavits of Ruegg (¶6), Farrell (p. 2), Howes (¶9) at R. 27. Thus, the contractual release was not a qualification of Congress' power to regulate interstate commerce, but more akin to a government financial obligation or tax exemption contract—both of which are clearly binding on the government. *United States Trust Co.*, *supra*, 431 U.S. at 24 n. 21.[9]

The United States further argues that Section 301 of the RPSA, in which Congress included the standard reservation of the right to "repeal, alter, or amend this Act," negates the promises made by the United States to the Railroads in this case. U.S. Brf. at 22-23. It would be inconsistent with the entire history of the RPSA, not to mention blatantly unfair to the Railroads which paid millions of dollars to enter into the Basic Agreement, to construe Section 301 to give the United States absolute power to cancel its side of the bargain. Fortunately, there is a far more reasonable construction. Section 301 plainly contemplates only repeal, alteration or amendment of "this Act," not obligations incurred under the authority

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[9] Like a tax exemption contract, the release here is a pledge by the government to relieve the Railroads from a type of burdensome "social taxation"—the stream of deficits produced by the responsibility to operate intercity passenger trains. Like a government debt obligation, the release promised a "return," in the form of relief from such stream of deficits, on the Railroads' payment of millions of dollars to capitalize Amtrak. From the latter perspective, the subsequent legislation requiring the Railroads to reimburse Amtrak for free and reduced rate transportation is analogous to legislation reducing the interest payable on a government debt obligation—a clear impairment of contract. See *Murray v. Charleston*, 96 U.S. 432 (1878).

granted in the Act while it is in effect. Section 301 is the section of the Act which authorizes the incorporation of Amtrak as a federally-chartered "for profit corporation," and sets forth its corporate purpose.[10] The reservation of the right to "repeal, alter, or amend" in such a provision means that the "corporate charter may be repealed or amended, and, within limits not now necessary to define, the interrelations of state, corporation and stockholders may be changed; *but neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired.*" *Coombes v. Getz*, 285 U.S. 434, 441-42 (1932) (emphasis supplied). *Accord*, *Sinking-Fund Cases*, *supra*, 99 U.S. at 721. Here, the United States is the chartering government and Amtrak the chartered corporation. Thus, the release from all intercity rail passenger responsibility, which was vested in the Railroads as of 1971, is a contractual right of "third persons" that cannot be impaired or destroyed by a subsequent legislative enactment.

Finally, the United States contends that the release was no different from a wholesale discontinuance proceeding, and that a discontinuance certificate does not guarantee against reimposition of passenger service obligations so long as the carrier continues to operate freight lines in interstate commerce. See U.S. Brf. at 15, 23-26, citing *Chesapeake & Ohio Ry. v. Public Service Comm'n*, 242

[10] It has long been established that a corporate charter is a contract between the chartering government and the corporation, and that absent a reservation of the right to "repeal, alter, or amend," a subsequent modification of the charter can constitute an impairment of contract. *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819); *Sinking-Fund Cases*, 99 U.S. 700 (1878) (federally-chartered corporation). Accordingly, it has long been universal practice to include a provision in statutes authorizing the chartering of new corporations to the effect that the chartering government reserves the right to "repeal, alter, or amend." See generally B. Wright, The Contract Clause of the Constitution 168-178 (1938).



U.S. 603 (1917). This overlooks the fact that the release promises relief far broader than that of a discontinuance certificate and was offered in exchange for the payment of millions of dollars of "consideration."

In summary, the RPSA and the Basic Agreements clearly imposed a binding contractual obligation on the United States, and there is no reason not to give effect to that obligation.

## II.

## THE PAYMENT REQUIREMENT OF SECTION 405(f) IMPAIRS THE RELEASE FROM ALL RESPONSIBILITY FOR INTERCITY RAIL PASSENGER SERVICE BECAUSE THE RELEASE INCLUDES FINANCIAL RESPONSIBILITY FOR EMPLOYEE PASS PRIVILEGES.

Given that the release from all responsibility for intercity rail passenger service is a contractual obligation of the United States, the next question is whether the reimbursement requirement of the 1979 and 1981 Amendments substantially impairs that obligation. See *United States Trust Co.*, *supra*, 431 U.S. at 17. The reimbursement requirement impairs the release both directly and indirectly. The direct impairment, which is discussed in this section of the brief, derives from the fact that responsibility for intercity rail passenger service includes financial responsibility for pass riders. The indirect impairment, which is discussed in Part III, derives from the fact that the reimbursement requirement compels the Railroads to subsidize Amtrak's general passenger operations.

The release is set forth in Section 401(a)(1) of the RPSA and in Paragraph 2.1 of the Basic Agreements (J.A. at 13), both of which provide that the Railroads "shall be relieved" of their "entire responsibility for the provision of intercity rail passenger service." "Intercity rail passenger service" is expressly defined in section 102(5) of the RPSA (45 U.S.C. §502(5)):

> "Intercity rail passenger service" means *all* rail passenger service other than commuter and other short-haul service in metropolitan and suburban areas, usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations . . . (Emphasis supplied.)

Article I of the Basic Agreements contains a similar definition. J.A. at 12. In other words, under the Act and the Basic Agreements "intercity rail passenger service" includes *all* transportation of persons by rail not otherwise excluded by the definition. There is no exclusion for transportation services provided to railroad employees pursuant to pass privileges. Hence by the plain terms of both the RPSA and the Basic Agreements, ridership pursuant to pass privileges is necessarily included within the terms of the release.

The Act does not define what it means by "responsibility" for intercity rail passenger service. However, when the Act and the Basic Agreements relieved the Railroads of their "entire responsibility," the only possible interpretation is that they were relieved of *financial* responsibility. See pages 20-21, *supra*. Given that "intercity rail passenger service" is expressly defined to include pass riders, and that "all responsibility" must be interpreted to mean financial responsibility, it necessarily follows that the Railroads were relieved of financial responsibility for employee pass privileges.

There was good reason for Congress to define "intercity rail passenger service" in a way that caused the Railroads' release to apply to responsibility for providing passenger service to railroad employees. As Amtrak has pointed out (Amtrak Brf. at 7, 11; see also GAO Report, J.A. at 47-48), pass privileges for employees of railroads offering passenger service had been an accepted industry practice for decades prior to 1970. Because of this, it was widely recognized that such passes were a necessary



incident—and a necessary cost, albeit small—of providing rail passenger service, no different from the many other indirect costs associated with transporting rail passengers, such as advertising, reservation systems, station facilities and the like, which had also become accepted industry practices. In enacting legislation whereby Amtrak would contract to take over the Railroads' "responsibility" for intercity rail passenger service, it was entirely reasonable for Congress to provide, and certainly reasonable for the Railroads to expect, that in doing so Amtrak would assume the obligations of all of these incidental costs, and that the Railroads would be relieved of them. Congress was not writing on a clean slate; it was transferring financial responsibility for an entire passenger transportation system that had been in existence for more than a century, and there is nothing in the RPSA or its legislative history to suggest that the transfer of responsibility applied only to selected aspects of that system.

Section 7.5 of the Basic Agreement, devoted to transportation privileges, supports the conclusion that the release applies to pass privileges. That section provides that "[t]ransportation privileges, if any, with respect to . . . personal travel of Railroad personnel *shall be as determined by NRPC*" (emphasis supplied). Under general rules of contract interpretation,[11] this allocation to Amtrak of responsibility for providing pass privileges creates the inference that Amtrak was also to bear the financial responsibility for such passes. Restatement (2nd) of Contracts §§202-03 (1979). Furthermore, Amtrak in fact paid the costs of the pass program prior to the enactment of

[11] The general rules of interpretation are clearly applicable here. As stated in *Lynch v. United States*, 292 U.S. 571, 579 (1934): "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

the first version of Section 405(f) in 1972. Thus the practical construction of the parties assumed the Railroads were relieved from responsibility for pass privileges. This is also strong evidence of the meaning of the contract. *See, e.g.*, Restatement (2nd) of Contracts §§201(1), 202(5) (1979); Williston on Contracts §623 (3d ed. 1961).

Despite this abundant authority establishing that the release afforded the Railroads included financial responsibility for pass privileges, the Court of Appeals held that, because the Railroads were not required to provide pass privileges by "any contract or collective bargaining agreement" *in effect in 1971* (Amtrak J.S. at 6a), the obligation to fund pass privileges was not a "responsibility" from which the Railroads had been released. In so holding the Court of Appeals took far too narrow a view of the broadly worded term "entire responsibility" as used in the RPSA and the Basic Agreement. As previously stated, the purpose of the RPSA to shift the burden of the entire rail passenger system from the Railroads to Amtrak compels the conclusion that the "entire responsibility" from which the Railroads were released encompassed all the incidental costs traditionally associated with transporting rail passengers, including pass privileges. The Senators who supported the enactment of Section 405(f) in 1972,[12] and the Interstate Commerce Commission,[13] ap-

[12] As noted by Amtrak, at least one Senator believed the passes to be the subject of "promises of long standing" by the railroads. Amtrak Brf. at 11, citing 118 Cong. Rec. 14791 (1972).

[13] In numerous intercity rail passenger service discontinuance proceedings prior to 1971, the Interstate Commerce Commission—the agency long responsible for application of the Interstate Commerce Act—had held that pass ridership had to be taken into account in assessing the benefits of individual rail passenger movements. *See, e.g., Penn Central Co. Discontinuance of Trains Nos. 574 and 575*, 334 I.C.C. 312, 332 (1969); *see also Union Pacific R. Co. Discontinuance of Trains Nos. 35 and 36*, 338 I.C.C. 50, 53 n. 1 (1970); *Penn Central Transp. Co. Discontinuance of 34*

(Footnote continued on following page)



parently considered pass privileges to be a "responsibility" of the Railroads.

But even if the Court of Appeals' narrow view were correct and pass privileges were not a "responsibility" as of 1971, it does not follow that if pass privileges *subsequently* were to become a responsibility, they would not be covered by the release. Section 401(a)(1) relieves the Railroads of their responsibilities "under part I of the Interstate Commerce Act or any State *or other law* relating to the provision of intercity passenger service" (emphasis supplied). Section 405(f) of the RPSA is clearly an "other law" relating to the provision of intercity passenger service, as that term is defined in the RPSA. More importantly, a limitation of the release to obligations in effect in 1971 would render the protection afforded the Railroads meaningless. Consistent with this interpretation, a Railroad could be required to shoulder responsibility for any type of passenger service or benefit *not mandated* by statute or contract in 1971, such as new passenger service routes, routes abandoned prior to 1971, or routes served by another carrier as of 1971. Surely this was not what Congress intended or what the Railroads reasonably understood the release to mean.

The United States contends, as an alternate ground in support of the Court of Appeals holding, that the Railroads' release was limited to "common carrier" responsibilities and that pass privileges do not fall into this category. U.S. Brf. at 29-30. This argument also overlooks the fact that pass privileges were one of a number of incidental costs traditionally associated with the railroads' com-

[13] *continued*
*Trains*, 338 I.C.C. 390, 474 (1970). The direct consequence of this was that the provision of pass privileges made it more difficult for carriers to discontinue passenger trains. Thus, the provision of pass privileges contributed directly to establishing the carriers' overall responsibility for passenger service.

mon carrier responsibilities and that the benefits of such privileges were taken into consideration in Interstate Commerce Commission proceedings seeking discontinuance of common carrier passenger services. In any event, the United States focuses on only that part of §401(a)(1) declaring the effect of the Railroads' release on common carrier statutes and ignores the broad language elsewhere in §401(a)(1), in the Basic Agreement, and in the legislative history of the RPSA (H.R. Rep. No. 91-1580, 91st Cong., 2d Sess. 9 (1970)) relieving the Railroads from their "entire responsibility for the provision of intercity rail passenger service" without any "common carrier" qualification.

In short, under the terms of the Rail Passenger Service Act and Basic Agreements, when the Railroads were relieved of their "entire" responsibility for the provision of intercity rail passenger service in 1971, they were relieved of all obligations incident to the provision of such service, both present and future. The Railroads were thus relieved of the statutory obligation—first imposed by Section 405(f) in 1972 and then amended in 1979—to reimburse Amtrak for pass privileges.

## III.

## THE PAYMENT REQUIREMENT OF SECTION 405(f) IMPAIRS THE RELEASE FROM ALL RESPONSIBILITY FOR INTERCITY RAIL PASSENGER SERVICE BY COMPELLING THE RAILROADS TO SUBSIDIZE AMTRAK'S PASSENGER SERVICES TO THE GENERAL PUBLIC, AND IS IN ANY EVENT IRRATIONAL.

The Court of Appeals found the payment requirement of the 1979 and 1981 Amendments to Sec. 405(f) to be unenforceable because it "transfers funds from the railroads to Amtrak, which funds Amtrak may in turn use to finance aspects of its operations that were once part of the railroads' entire responsibility for the provision of



intercity rail passenger service." Amtrak J.S. at 8a. This conclusion is sound and should be affirmed.

### A. The Effect And Purpose Of The 1979 And 1981 Amendments Were To Require The Railroads To Pay Part Of The Costs Of Providing Rail Passenger Service To The Public.

Neither Amtrak nor the United States has ever asserted in their briefs here or in the courts below that the additional or "incremental" costs of transporting pass riders justify the payment requirement, or that Congress ever thought they did. This is because the additional costs of "space available" travel, however they may arguably be calculated, do not approach the level of the payment requirement, and are in any event offset by the revenues obtained from half-fare pass riders. See GAO Report, J.A. at 64.[14] It thus follows, and is equally undisputed, that

[14] Although Amtrak suggests that pass privileges "to some degree" deprive it of revenues it might otherwise obtain from pass riders (Amtrak Brf. at 27), neither it nor Congress has ever quantified these supposed lost revenues or seriously contended that they approach the amounts collected from the Railroads under the payment requirement. (For such supposed lost revenues to equal the payments which the Railroads are required to make under the 1979 and 1981 Amendments, approximately 25 percent of the present free pass riders and 75 percent of the present half-fare pass riders would have to choose Amtrak at full fares over competing modes of intercity transportation, whereas less than one-half of 1 percent of the general public does so. S. Rep. No. 96-183, 96th Cong., 1st Sess. 4 (1979) (table).)

Amtrak also notes that the payment requirement is in lieu of "any charges for liability" incident to pass rider travel, as well as "other costs" of pass privileges. Amtrak Brf. at 13, n. 39. But Amtrak does not attempt to show that the amount of such "charges" justifies the required payments. Neither the record here nor the legislative history of the 1979 Amendments contain any discussion of what, if anything, the amount of such charges might be, but the Interstate Commerce Commission obviously did not consider them to be a significant factor in its determination of the "costs" of pass privileges under the 1972 version of §406(f). *Cost Reimbursement Decision*, J.A. at 23-38.

the payments required by the 1979 and 1981 Amendments may be used by Amtrak in their entirety to cover costs which are necessary to provide passenger service to the general public.

There is, moreover, very substantial evidence that the *purpose* of the payment requirement of the 1979 and 1981 Amendments was to obtain additional revenues to pay for Amtrak's passenger service to the public.[15] The Amtrak Reorganization Act of 1979, of which the 1979 Amendment to Sec. 405(f) was a part, was prompted largely by concerns over the deficits being incurred by Amtrak. S. Rep. No. 96-183, 96th Cong., 1st Sess. 11 (1979). Congress certainly knew that the amounts of the required payments added in 1979 exceeded the "costs" of the pass rider program as determined by the Interstate Commerce Commission under the 1972 version of Sec. 405(f). The Senate Committee Report on the 1979 Act stated:

> While the Committee is concerned that Amtrak may not be receiving adequate compensation from the industry for the total cost of the pass rider program, the Committee believes that the new formula reflects revenue considerations rather than cost considerations. S. Rep. No. 96-183, 96th Cong., 1st Sess. 10 (1979).

Furthermore, the internally inconsistent direction from Congress to the GAO in the 1979 Act to determine reimbursement for the "cost" of pass rider services by "taking into account the *value* of the services being provided" (Pub. L. No. 96-73 (1979), Section 120(b); emphasis supplied) and the determination to charge the railroads exactly the same amount per mile for half-fare pass travel as

[15] Although the Court of Appeals did not consider it necessary to determine the motivation for the payment requirement, it found that "it would be reasonable to conclude from the record that the financial debacle of Amtrak's first eight years contributed to the new method of cost spreading." Amtrak J.S. at 7a-8a.



for free pass travel also demonstrate a dominant motivation to increase Amtrak's revenues, rather than to assign the railroads a fair share of responsibility for passes.

### B. The Railroads' Contract With The United States Releases Them From Any Obligation To Pay Amtrak Any Part Of The Costs Of Providing Rail Passenger Service To The Public.

Section 401 of the RPSA was clearly intended to relieve the Railroads from their responsibility for *public* rail passenger service. Public passenger service was unquestionably a "responsibility" of the Railroads on April 30, 1971, and it was also unquestionably a "common carrier" responsibility. It is also clear that the "responsibility" from which the Railroads were relieved was *financial* responsibility. See pages 20-21, *supra*. The whole point of the RPSA was to shift the costs of rail passenger service from the railroads to Amtrak.

In determining the scope of the financial responsibility for public passenger service from which the Railroads were released it is obviously essential to examine the financial responsibility the Railroads themselves had for such service before the RPSA was enacted. The Railroads always considered pass privileges to be incidental to public passenger service and entirely dependent upon the provision of that service; pass privileges were granted only on a "space available" basis and were discontinued when public passenger service was discontinued. Thus, when the Railroads provided passenger service, they did not allocate any more than an "insignificant" amount of incremental costs to the pass programs (GAO Report, J.A. at 48); the rest of their passenger costs they attributed to service to the public. The Interstate Commerce Commission also took this view of passenger service costs in 1972 when it concluded that the "costs" of pass privileges under the 1972 version of Section 405(f) were incremental costs. *Cost*

*Reimbursement Decision*, J.A. at 46. Indeed, the custom of pass privileges would undoubtedly never have arisen if passes had been thought to involve expenditures any greater than merely those of filling an otherwise empty seat.

Construing the Railroads' release in light of the facts and circumstances in existence when the contract was made (see Restatement (2d) of Contracts, §202(1) (1979)), the provisions of the RPSA and the Basic Agreement releasing the Railroads from their "entire responsibility for the provision of intercity rail passenger service" must be read to mean at the very least that the Railroads cannot be compelled by statute to pay any of the costs which are necessary to provide intercity rail passenger service to the general public and which would be incurred in the absence of any pass privileges. The payment requirement at issue here, by forcing the Railroads to pay more than the incremental costs of "space available" pass rider service, plainly violates the release as so construed. The payments directly and foreseeably reduce Amtrak's public passenger service deficits both under the principles followed by the Railroads when they had the "responsibility" for passenger service and under any common sense analysis. Thus, as stated by the Court of Appeals, the 1979 and 1981 Amendments "attempt to take back part of what Congress authorized Amtrak to give in the basic agreement" (Amtrak J.S. at 8a).

Amtrak inexplicably treats this basic issue in the most perfunctory fashion in its brief. After noting the holding of the Court of Appeals that the Basic Agreement did not release the Railroads from all pass rider obligations, Amtrak flatly asserts—in direct contradiction to what the Court of Appeals said—that therefore the Basic Agreement is irrelevant and that "the Court of Appeals' analysis must rest on the proposition that no person may be required to pay more than incremental costs for services



provided at the direction of the government" (Amtrak Brf. at 20-21).

Amtrak ignores the key element in the Court of Appeals' reasoning. The Railroads here do *not* have "the same rights and obligations as other members of the public" (Amtrak Brf. at 20), or even the same rights as other railroads which did not enter into the Basic Agreement. Even if Congress has not totally released its power to impose charges on the Railroads for pass rider services, it has plainly circumscribed that power and simply does not have the discretion to impose such charges on the Railroads that Amtrak argues it has with respect to other persons.

### C. The Payment Requirement Is Irrational And Therefore Unenforceable Even Apart From The Railroads' Contract With The United States.

The major thrust of Amtrak's argument to this Court is that if the Basic Agreement is ignored, the terms of the payment requirement are within the discretion of Congress under prior decisions of this Court. Amtrak Brf. at 21-30. Even on this point Amtrak is wrong.

The GAO Report, upon which Amtrak principally relies, cannot be used to justify the amount of the payment requirement even if its failure to take into account the Railroads' release is not a fatal flaw. That report rejected fully allocated costs as a basis for the Railroads' payments under Section 405(f) and said Congress should choose between "incremental costs" and "value." J.A. at 63, 80-81. Amtrak and the United States assert that Congress properly chose the "value" approach. Amtrak Brf. at 29-30; U.S. Brf. at 34. Yet the only case cited in support of that approach, *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974), dealt with fees paid to the government by users of the government's services. The

present case, however, involves compulsory payments from one person to another for services provided to a third person at the latter's discretion, a situation in which the "value" of the services is not a reasonable measure of the amount of the payments. The "value" approach is, moreover, inconsistent with this Court's holding in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980), that a state's exaction from litigants of sums "not reasonably related to the *costs* of using the courts" was an invalid taking (emphasis supplied).

But even if it were proper to base the payments on the "value" of the pass privileges as suggested by the GAO, the Court of Appeals was clearly correct in concluding, as an alternative ground for its decision, that the formula adopted by Congress "irrationally eliminates the offset for half fares." Amtrak J.S. at 10a. Amtrak and the United States have never attempted to explain how pass riders who already pay half fares receive more "value" than those riding for free, so as to justify identical payments from the Railroads.[16]

## IV.

## THE IMPAIRMENT OF THE RAILROADS' CONTRACT IS NOT EXCUSED BY CONSIDERATIONS OF PUBLIC POLICY, LACK OF RELIANCE, OR INSUBSTANTIALITY.

Amtrak and the United States assert that if the 1979 and 1981 Amendments impaired the contract rights of the Railroads, the impairment was excused for various reasons and thus did not violate the Fifth Amendment. Amtrak

[16] The payment requirement is also unreasonably set at a percentage of "average monthly yield per passenger mile," which includes revenues for services, such as metroliners, not included in the pass privileges. *See* GAO Report, J.A. at 51-52.



Brf. at 30-44; U.S. Brf. at 35-38.[17] Although this Court has recognized that state or federal legislation impairing contracts may be justified in some circumstances, none of those circumstances are present here, whether the contract right impaired was a release from all responsibility for pass riders or merely from responsibility for Amtrak's public passenger service.

### A. The Impairment Was Not Reasonable And Necessary To Further An Important Public Purpose.

This Court has held that the government is not free "to consider impairing the obligations of its own contracts on a par with other policy alternatives." *United States Trust Co., supra*, 431 U.S. at 30-31. As Justice Brandeis put it in *Lynch v. United States, supra*, 292 U.S. at 580, Congress is "without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure," is not a legitimate governing act but an act of "repudiation."

In particular, where the government enters into a contractual obligation, any subsequent impairment of that contract is unconstitutional unless it is "reasonable and necessary" to serve an "important" public purpose. *United States Trust Co., supra*, 431 U.S. at 29. The government bears no small burden in justifying such an impairment, because "the State's self-interest is at stake." *Id.* at 26; see also *Energy Reserves Group, Inc., supra*, 459 U.S. 400, 412-413 n. 14.

In light of these authorities, the impairment of the Railroads' contracts by the payment requirement of the 1979

[17] The United States' argument on this point is premised upon the "rational basis" test, which is clearly inapplicable to impairments by the United States of its own contracts for reasons stated at pages 13-14, *supra*.

and 1981 Amendments cannot be justified on any public policy ground. In *United States Trust Co.*, where the legislation in question was intended to advance "[m]ass transportation, energy conservation, and environmental protection," which were goals of "important and . . . legitimate public concern" (431 U.S. at 28), the Court nevertheless struck down the offending statute because it was not necessary to impair the contract in order to achieve these ends. *Id.* at 30. Here, the immediate purpose of Section 405(f)—to preserve an employee fringe benefit—does not rise to the dignity of the public policy concerns in *United States Trust Co.* And even if the legislative purpose underlying Section 405(f) is described in more general and speculative terms, such as the desirability of maintaining labor harmony, there was no need to repudiate the Railroads' release in order to obtain that harmony; the United States or Amtrak could simply have paid for the pass privileges themselves.

Similarly, there is no merit to the suggestion that it was reasonable to make the Railroads pay for the pass privileges because they originated the practice. United States Brf. at 37. On this logic, the United States could, because the Railroads also originated the entire rail passenger system, force the Railroads to resume operating rail passenger trains, or to pay all of Amtrak's expenses, thus defeating the entire purpose of the RPSA.

In short, there was no need for the 1979 and 1981 Amendments, other than Congress' understandable desire "to reduce expenditures." Undoubtedly for this reason, Amtrak does not strongly urge a public policy justification for the impairment, but attempts instead to excuse the impairment on other grounds. Amtrak Brf. at 30-44. These grounds are, however, equally unpersuasive, for the reasons set forth below.



**B. The Impairment Was Not In Accordance With The Reasonable Expectations Of The Railroads.**

Amtrak argues that the impairment of the Railroads' contract rights was justified because the Railroads had no "reasonable expectations" that the impairment would not occur. Amtrak Brf. at 33-39.

Amtrak first contends that the railroad industry has historically been widely regulated; that therefore the Railroads should have expected that Congress might act to deprive them of the benefit of their bargain; and that such expectation excuses the impairment. There is, however, no basis for the proposition that the United States may regulate away its own contractual commitments. The cases cited by Amtrak (Amtrak Brf. at 33) deal with expectations regarding rights acquired under private contracts, not contracts with the United States.

Amtrak further asserts that because the Railroads would have entered into the Basic Agreement in the absence of any release from payment requirements of the type imposed by the 1979 and 1981 Amendments, they therefore could not have reasonably expected to be relieved from those payments. Amtrak Brf. at 35-36. Amtrak's assumption that the Railroads would have accepted a lesser release is highly speculative and ignores the fact that a number of major railroads did not even enter into the Basic Agreement as offered. GAO Report, J.A. at 48 n. 1. In any event, contracts are enforced according to their terms, not according to what the parties might have agreed to, and the United States in particular is bound to its contractual obligations even if it could possibly have made a better deal. *Cf. Lynch v. United States*, 292 U.S. 571, 576 (1934). Furthermore, the impairment here is of the principal obligation of the contract, not a minor collateral term as in *City of El Paso v. Simmons*, 379 U.S. 497 (1965). Thus the Railroads had every reason to ex-

pect their release to be enforced in its entirety, even if in hindsight the United States might have driven a harder bargain or obtained the same funds from the Railroads in exchange for a narrower release.

Amtrak next argues that the Railroads could not have reasonably expected to be released from payment requirements such as those imposed by the 1979 and 1981 Amendments because the RPSA imposed other obligations on them to protect employees and to cooperate in providing facilities and services to Amtrak. Amtrak Brf. at 36. The employee protection required by Section 405 of the RPSA did not include the continuation of pass privileges (*Baker v. System Federation No. 1*, 331 F.Supp. 1363, 1365 (E.D. Pa. 1971)) or any payments to Amtrak, and the arrangements established by the Railroads under that section, which were approved by the Secretary of Labor, did not provide them.[18] The statutory obligation to cooperate with Amtrak was expressly conditioned on the railroads receiving "just and reasonable" compensation. RPSA, §402(a). Thus the provisions cited by Amtrak are in no way inconsistent with the Railroads' expectation that they were free of any responsibility for pass privileges or financial support of passenger service to the public.

Finally, Amtrak contends that honoring the Railroads' release will give them an "unintended benefit" which they could not reasonably have expected, thus excusing impairment of their contracts under *City of El Paso v. Simmons*, 379 U.S. 497 (1965). Amtrak Brf. at 37. The only "unintended benefit" relied upon by Amtrak, however, is the supposed benefit the Railroads received by reason

[18] The arrangements provided only that employees affected by the discontinuance of passenger service would continue to receive all the fringe benefits received by other employees during the protective period. Complaint, Ex. B, Appendix C-1, Art. I, Sec. 8, at R. 1.



of Congress' own action in 1972 in requiring Amtrak to provide pass privileges. Even if pass privileges to the Railroads' employees were a meaningful benefit to the Railroads themselves, those privileges are not the sort of unexpected advantage which excused impairment in the *El Paso* case. That case involved unintended benefits caused by changing economic conditions and "the evolution of a frontier society to a modern State, attended by the discovery of oil and gas deposits" (379 U.S. at 511), not purely volitional action by the State itself.[19] A government entity cannot impair its contracts at will merely by offering the other parties some supposed benefit which they have not agreed to.

Amtrak appears to concede that a contract impairment that interferes with "distinct investment-backed expectations" may not be excused. Amtrak Brf. at 39. The Railroads had just such expectations here when they elected to pay the substantial price placed by Section 401(a)(2) of the RPSA on the release offered in Section 401(a)(1). See page 21, n. 9, *supra*.

### C. The Impairment Was Not Insubstantial.

The payment requirement of the 1979 and 1981 Amendments has forced the five Railroads alone to pay Amtrak more than $1 million per year. The Court of Appeals was clearly correct in concluding that the amount of the payments "precludes any contention that [the payment requirement] is merely a 'minimal' alteration of the basic agreement." Amtrak J.S. at 8a n. 6.

Amtrak asserts, without any citation of authority, that the test of the substantiality of an impairment is not its

[19] The impairment in *El Paso* was also held to be justified by public policy needs to settle land titles and promote the "efficient utilization of public lands." 379 U.S. at 516.

"absolute" amount but some kind of comparison of that amount to the total amount involved in the contract. Amtrak Brf. at 40. The Court has, however, never adopted this kind of analysis when the impairment involves the destruction of a discrete contractual right or the deprivation of a precisely quantifiable increment in contractual value. In *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), for example, the impairment involved the destruction of a security provision in the state's contract with bondholders. Although the record was unclear as to "how much financial loss the bondholders suffered," 431 U.S. at 19, the Court nevertheless held that the impairment was unconstitutional. In *Murray v. Charleston*, 96 U.S. 432 (1878), a reduction in interest payable on bonds was similarly held to constitute an unlawful impairment. Cases involving "takings" do not, as Amtrak asserts (Amtrak Brf. at 42), support its position because the diminution in value test applies only when it is not otherwise clear that a taking has occurred. Thus, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), this Court held that the State's refusal to pay over interest earned on an interpleader account was a taking, even though the interest represented only a small fraction of the total value of the account. Similarly, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-438 (1982), the Court held that a government directive to install a rooftop television cable without compensation was a taking, even though the percentage diminution in value was minuscule. In each case, the State had clearly taken *all* of the incidents of some portion of a particular fund or property. Here, the United States has completely deprived the Railroads of a portion of their release from responsibility for intercity rail passenger service, and the fact of this appropriation can be determined by merely examining the bills submitted by Amtrak to the Railroads pursuant to Sec. 405(f).



Moreover, Amtrak's attempt to minimize the relative amount of the impairment is flawed. The value of the contract is properly measured by the price which was required to enter into it, which not all railroads were willing to pay (GAO Report, J.A. at 48, n.1). The additional payments compelled by the 1979 and 1981 Amendments are clearly substantial in relation to the $82.8 million paid by these Railroads to Amtrak, which Section 401(a)(2) of the RPSA provided was the sole "consideration" for the release offered by that statute.

## V.

## THERE IS NO NEED TO REACH THE CONSTITUTIONAL ISSUES IN THIS CASE BECAUSE THE BASIC AGREEMENT CONSTITUTES "A DIFFERENT BASIS FOR COMPENSATION" WITHIN THE MEANING OF SECTION 405(f).

This Court has repeatedly held that controversies should not be resolved on constitutional grounds if there is "some other ground upon which to dispose of the case." *Escambia County v. McMillan*, ___ U.S. ___, 104 S. Ct. 1577, 1579 (1984); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). The 1979 and 1981 Amendments to §405(f) can be construed to avoid the constitutional issues presented herein.

Under the 1972 version of §405(f), the reimbursement for rail passenger privileges was limited to "such costs as may be incurred," and these costs were to be determined by the Interstate Commerce Commission, unless the railroads and Amtrak agreed on a determination of costs within a 90-day period after the enactment of the statute. Under the 1979 and 1981 Amendments, in contrast, the railroads are to pay Amtrak "at the rate of 25 percent of the systemwide average monthly yield per revenue passenger mile," unless Amtrak and the railroads

"agree on a different basis for compensation." RPSA, §405(f). Significantly, the 1979 and 1981 Amendments do not limit the period for agreement on a "different basis for compensation" to a period *after* the enactment of the 1979 Amendments, or indeed to a period *after* the 1972 Amendments. Such a limitation would require language invalidating any prior agreements; neither Amendment contains language with this effect. Thus, there is no reason why a Basic Agreement negotiated *prior to 1972* could not be considered an agreement between a Railroad and Amtrak for a "different basis for compensation." The effect of this construction would be to render the payment requirement inapplicable by its own terms to railroads which entered into Basic Agreements prior to the 1972 Amendments, because Amtrak relieved those railroads of their "entire responsibility" for such payments for the reasons stated in Parts II and III, *supra*.[20]

The 1979 and 1981 Amendments respect the principle of contract by authorizing Amtrak and the railroads to contract out of the payment requirement specified therein. There is no reason why this respect should not be extended to the contracts negotiated between the railroads and Amtrak in 1971. Construing the 1979 Amendment's reference to a "different basis for compensation" to encompass the pre-1972 Basic Agreements would avoid the constitutional issues presented by this litigation, and prevent a basic unfairness to the Railroads.

[20] As Amtrak notes, the payment requirement is also applicable to railroads which did not enter into a Basic Agreement. Amtrak Brf. at 21 n. 64. Thus this construction of the 1979 and 1981 Amendments leaves them with substantial effect.



## CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed with respect to the question presented in No. 83-1492 and reversed with respect to the question presented in No. 83-1633.

Respectfully submitted,

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# REPLY

# BRIEF

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Nos. 83-1492 and 83-1633

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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NATIONAL RAILROAD PASSENGER CORPORATION,
*Appellant, Cross-Appellee,*

v.

ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY,
BURLINGTON NORTHERN, INC.,
CHESAPEAKE AND OHIO RAILWAY COMPANY,
BALTIMORE AND OHIO RAILROAD COMPANY, and
UNION PACIFIC RAILROAD COMPANY,
*Appellees, Cross-Appellants.*

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**On Appeal from the United States Court of Appeals for the Seventh Circuit**

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## REPLY BRIEF FOR APPELLANT, CROSS-APPELLEE

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**On Appeal from the United States Court of Appeals for the Seventh Circuit**

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## REPLY BRIEF FOR APPELLANT, CROSS-APPELLEE

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The National Railroad Passenger Corporation ("Amtrak"), Appellant in No. 83-1492 and Cross-Appellant in No. 83-1633, hereby submits its Reply Brief in response to the Brief of the Railroads filed on December 15, 1984.

## ARGUMENT

### I. THE RAILROADS HAVE NOT SHOWN THAT THEY RECEIVED ANY CONTRACTUAL RIGHT TO BE RELIEVED OF THE OBLIGATION TO COMPENSATE AMTRAK FOR THEIR EMPLOYEES' PASS PRIVILEGES.

In order to establish that their right to Due Process has been violated, the Railroads must first show that they received contractual rights enforceable against the United States relieving them of all responsibility for supporting intercity rail passenger service after May 1, 1971. Their elaborate argument that they received such rights is not persuasive. Their brief fails adequately to explain, for example, how they could have expected Congress to bind itself in a statute that expressly reserved Congress' power to amend, alter, or repeal it at a later date.[1]

Even if the Railroads did receive such contractual rights,[2] they have not shown that their contract included

[1] Section 301 of the Rail Passenger Service Act ("RPSA"), 45 U.S.C. § 541 (1982). The Railroads attempt to dismiss this reservation of power by characterizing it as legal boilerplate intended to preserve Congress' right to alter Amtrak's charter. Railroads' Brief at 22 n.10. Were this true, Congress would have reserved the right to make changes in "this section" or "this title," not in "this chapter"—that is, the entire RPSA. They also assert that Congress' right to repeal the statute does not imply a right to abrogate separate obligations incurred under the authority of the statute. *Id.* at 21-22. Here the only language that could plausibly be the source of the Railroads' relief is contained in the statute itself and is thus expressly subject to amendment or repeal.

[2] Both of the principal arguments advanced in Amtrak's initial brief—that reasonable payments in excess of incremental costs may lawfully be required, and that no substantial impairment of the Railroads' contract rights has occurred—represent grounds on which the 1979 Amendment may be sustained even if the Railroads did receive contract rights enforceable against the United States. Thus the Court need not reach the question whether such rights were created by either the RPSA or the Basic Agreement.



the right to be relieved of any obligation to pay for their employees' pass privileges. Quoting the statutory definition of "intercity rail passenger service" as it was originally enacted in section 102(5) of the RPSA, 45 U.S.C. § 502(5), they assert that the term was "expressly defined to include pass riders," and even suggest that Congress deliberately defined the term broadly *for the purpose* of ensuring that employee pass travel was covered. Railroads' Brief at 24. But the language they cite[3] does *not* mention pass travel and is of no relevance to the issue of financial responsibility for employee transportation benefits. They also urge that the Basic Agreement absolves them of all financial responsibility for employee pass travel, but it too fails even to mention the subject.[4]

[3] As originally enacted, 45 U.S.C. § 502(5) stated:

> "Intercity rail passenger service" means all rail passenger service other than . . . commuter and other short-haul service in metropolitan and suburban areas, usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations . . . .

[4] The Railroads maintain that section 7.5 of the Basic Agreement —the provision declaring that Amtrak has the right to decide what level of pass privileges, if any, will be provided—creates an inference that the Railroads will have no financial responsibility whatsoever for privileges that are provided. Railroads' Brief at 25-26. There are several different reasons why the language in section 7.5 does not support their claim. First, as Amtrak pointed out in its Brief at 20 n.63, the portion of section 7.5 dealing with employee pass privileges is the only one of five separate provisions that does *not* allocate costs between Amtrak and the Railroads, thus creating the quite different inference that the parties did not form any intent with respect to this issue. Second, the statute provides a release only from "responsibilities under section I of the Interstate Commerce Act," which did not include the responsibility to provide or pay for employee pass privileges, and Amtrak and the Railroads were not empowered to expand the scope of this release by language in their contract. Third, even if the parties had agreed with respect to costs for pass travel provided at Amtrak's discretion in 1971, they surely reached no agreement concerning costs for the far broader pass privileges required by Congress to be provided after 1972.

Both courts below correctly determined that this language gave the Railroads no express contractual relief from the costs of employee pass travel. J.S. App. 4a-7a, 18a-19a.[5]

The Railroads go on to describe employee pass travel as an "incident" of the operation of intercity passenger trains, supposedly analogous to other incidental functions such as advertising and the handling of reservations. Railroads' Brief at 24-25. Their suggestion is that passenger train operation and employee pass travel go hand-in-glove, so that their surrender of responsibility for one function logically implied giving up the other. This line of reasoning supports the view that they have no obligation to run passenger trains in order to preserve their employees' pass rights, but it says nothing about their employees' pass travel on *Amtrak's* passenger trains. The privileges created by the 1972 Amendment are not a mere "incident" or natural outgrowth of Amtrak's passenger train operations;[6] instead, they are the result of Congress' determination that the expectations of the freight railroads' employees and retirees concerning lifetime pass travel were legitimate and should be protected. The Railroads had no reason to expect that, if Congress created a statutory pass

[5] The Railroads point to various ICC cases to show that the transportation of pass riders was their "responsibility" prior to 1971. Railroads' Brief at 26-27 & n.13. These decisions merely show that the elimination of rail pass travel was one relatively minor factor to be considered when the ICC assessed the effect of train discontinuances on the nation's transportation requirements. The ICC decisions do not indicate, as the Railroads suggest, that employer pass privileges were the sort of legal responsibility Congress meant to excuse in 1971; plainly they were not a responsibility of "a common carrier of passengers by rail" under "part I of the Interstate Commerce Act or any such State or other law relating to the provision of intercity passenger service . . . ." 45 U.S.C. § 561(a)(1).

[6] Indeed, even the privileges that existed before 1971 were not mere "incidents" of the Railroads' operation of passenger trains. The record shows that "freight-only" railroads and terminal companies also provided pass privileges for their employees. J.A. 47.



privilege to enhance the morale of their freight workforce and to maintain labor peace in their industry, they would not be required to make a contribution.[7]

## II. THE RAILROADS HAVE NOT EXPLAINED WHY THE REQUIREMENT THAT THEY PAY MORE THAN INCREMENTAL COSTS FOR THEIR EMPLOYEES' PASS TRAVEL VIOLATES THEIR RELEASE FROM THE OBLIGATION TO PROVIDE PASSENGER SERVICE.

Amtrak has shown that the requirement that the Railroads pay more than incremental costs for their employees' pass travel is constitutional, since the Railroads can invoke neither a general right to pay only incremental costs for services provided at government direction, nor a particular right to that effect grounded in the RPSA or the Basic Agreement. The Railroads respond by insisting that they do have rights and obligations different from those of the general public.[8] They

[7] The Railroads attempt to meet this point by contending that their release from all passenger service responsibilities included relief from all statutory obligations that might be imposed in the *future*, not just from those that existed in 1971. Railroads' Brief at 27. The notion that Congress bound itself so completely is inconsistent not only with the "amend, alter or repeal" language of section 301, but also with the experimental character of Amtrak and the RPSA. Elsewhere, in an equally inventive statutory construction, they assert that the language in the 1979 Amendment allowing Amtrak and the Railroads to "agree" on a basis for compensation other than the 25%-of-yield standard should be read to comprehend not just future agreements, but also the parties' alleged agreement in 1971 that there would be *no* compensation due Amtrak for Railroad employees' pass travel (as if the 1979 Amendment said "unless *they already agreed*" on a different basis for compensation"). *Id.* at 41-42. It is sufficient to say that in both cases the Railroads have devised creative but unpersuasive statutory interpretations that badly distort the evident intent of Congress.

[8] The Railroads take this position because they have difficulty showing that the right to pay only incremental costs is one shared by the general public. Were that the case, the fixed costs of services

assert that even if the statute does not excuse them from paying *any* costs of employee pass travel, Congress has "plainly circumscribed" its power to impose charges in excess of incremental costs. Railroads' Brief at 33.

The Railroads' argument consists of nothing more than this unsupported assertion—a bold *ipse dixit*. Nowhere do they explain why the general release from responsibility to operate passenger trains carries with it a special limitation on the amount they can be required to pay for their employees' fringe benefits.[9] They bear the burden of showing that fees higher than incremental costs are proscribed, and they have not met that burden.

The Railroads assert that even if the Basic Agreement leaves them on the same footing as the general public with respect to obligations for employee fringe benefits, they still cannot be required to pay more than the incremental cost of those benefits. Railroads' Brief at 33-34. They maintain that the Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), supports this view. But the *Webb's* decision, which was expressly limited to "the narrow circumstances of [that] case," *id.* at 164, at most stands for the proposition that the Railroads cannot be required to pay twice for the service they and their employees receive—and indeed, under section 405(f) they pay only once. The fact that

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provided at government direction could not be recovered, and Congress would be unable to pursue the policy of self-sufficiency reflected, for example, in the Independent Offices Appropriation Act, 31 U.S.C. § 9701 (1982). *See* Amtrak's Brief at 21-27.

[9] The closest the Railroads come to an explanation is the assertion that their general release "must be read to mean at the very least that the Railroads cannot be compelled by statute to pay any of the costs which are necessary to provide intercity rail passenger service to the general public and which would be incurred in the absence of any pass privileges." Railroads' Brief at 32. This formulation presupposes that they have a right to pay only incremental costs, and thus begs the central question: what is the source of that right?



the Railroads as well as their employees help defray the cost of pass travel is not a constitutional problem—particularly where, as in this case, the combined payments do not begin to cover the full costs of the service.[10]

The Railroads acknowledge that if the alleged contract is construed narrowly to exclude relief from payments for pass privileges, then they may be required to compensate Amtrak for the cost of those privileges. But they erroneously insist on interpreting "cost" to mean "incremental cost," as if no other possibilities existed. The concept of cost is broader than they admit, and includes, for example, fully allocated costs as well. Congress itself plainly used the term "cost" in this broader sense.[11]

On the facts of this case, compensation based on fully allocated costs might be more difficult to defend. But the fact is, Congress did not settle on a compensation scheme based on fully allocated costs. Instead, Congress appears to have taken the very high "full costs" of operating rail passenger service into account, along with numerous other factors, such as Amtrak's receipt of many half fares, the space-available limitation, and the shifting of

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[10] The record shows that in 1979, Amtrak was recovering slightly more than one-third of its full costs from revenues, and the balance was funded through federal subsidies. J.A. 62-63, 100.

[11] The Railroads assert that Congress gave GAO the "internally inconsistent direction" to determine appropriate "cost" reimbursement by taking into account the "value" of the pass privilege. Railroads' Brief at 30. The statute might be internally inconsistent if "cost" signified only "incremental costs," and for that very reason the Railroads should assume that Congress used the term in its less restrictive sense. Congress knew when it enacted this language that its 25% formula was higher than incremental cost, and that GAO's analysis based on value was likely to be higher as well. *See id.* It also knew that the full cost of Amtrak travel was more than ten times the amount of the statutorily required reimbursement (that is, the reimbursement was one-quarter of the price of a ticket, which in turn was approximately one-third of Amtrak's full cost).

all liability costs to Amtrak. On the basis of all these considerations, Congress discounted the Railroads' obligation substantially from the normal marketplace "value" of Amtrak travel, requiring the Railroads to pay only one quarter of the cost of a ticket for their employees' pass travel.

The Railroads do not dispute that Congress had these factors in mind; instead, they challenge the statute on the ground that its 25%-of-yield approach is not based on a precise determination of cost actually imposed.[12] They misconceive the limits of Congress' discretion in drafting legislation to address social and economic matters. There is no constitutional requirement that Congress undertake such precise quantification—it surely can deal with averages and approximations in determining the appropriate basis for spreading the costs of pass travel.[13]

The Railroads assert that "value" is not an appropriate issue for Congress to consider in fixing compensation for pass privileges. Railroads' Brief at 33-34, 39. Their argument overlooks the fact that, for their Due Process claim to succeed, they must at a minimum show that they were rendered worse off as a result of enactment of the 1972 and 1979 Amendments.[14] They cannot make such a

[12] The Railroads complain that Congress has not "quantified" the revenues Amtrak loses when persons who would otherwise choose to pay full fare are permitted to travel free or at reduced rates; and they protest that the legislative record does not show the costs Amtrak must bear as a result of Congress' assignment to it of all liability arising out of Railroad employees' pass travel. Railroads' Brief at 29 n.14.

[13] *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19 (1976); *see also* cases cited in Amtrak's Brief at 22-23.

[14] *See, e.g., Local Division 589, Amalgamated Transit Union v. Commonwealth of Massachusetts*, 666 F.2d 618, 639 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982); *cf. Chicago & North Western Transportation Co. v. United States*, 678 F.2d 665, 668-669 (7th Cir. 1982).



showing when Congress bestows a benefit on them and then requires them to make a reasonable payment for it. The 1972 Amendment plainly conferred a benefit on the Railroads, and the value of that benefit was an express and appropriate factor in Congress' decision to increase their compensation obligation in 1979.

The Railroads also claim that Congress has acted irrationally in applying the same compensation formula for on- and off-line pass travel, without taking into account Amtrak's receipt of half-fares for off-line trips. Railroads' Brief at 34. They ignore the fact that the difference between the two types of transportation is not as clear or important from the perspective of the Railroads as it may be from the perspective of individual pass riders.[15]

In sum, the Railroads cannot support their claim that they have some special contractual right to pay only incremental costs for their employees' fringe benefits. Congress acted rationally in considering the issues of cost and value that led to the 25%-of-yield formula, and it was not constitutionally required to undertake any more precise economic analysis.

## III. THE RAILROADS HAVE NOT SHOWN ANY SUBSTANTIAL IMPAIRMENT OF CONTRACTUAL RIGHTS.

The Court's contract impairment decisions plainly establish that "substantiality" is a threshold inquiry, and that impairments that are not substantial raise no constitutional issue. *E.g., Energy Reserves Group, Inc. v.*

[15] While Congress has chosen a reasonable approach by tying the Railroads' compensation obligation to actual usage of pass privileges by their employees, even this approach is not constitutionally compelled. The Railroads benefit, and have done so since 1972, just by virtue of inclusion of the statutory pass privilege in their employees' compensation packages. Thus the Railroads get a direct economic benefit, as well as improved morale, even though some employees may choose not to take full advantage of the privilege.

*Kansas Power & Light Co.*, 459 U.S. 400, 411, 413 (1983); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978). The Railroads attempt to dismiss the substantiality test on two grounds. First, they argue that it is not a relevant issue where a "discrete contractual right" has been destroyed or a "precisely quantifiable increment in contractual value" has been taken. Railroads' Brief at 40. Second, they assert that payments exceeding one million dollars a year cannot be deemed an insubstantial impairment of a bargain for which they paid some $82.8 million in 1971. *Id.* at 39, 41. The Railroads mischaracterize both what they have lost and what they gained in the first place.

Given the Railroads' inability to point to any language in the RPSA or the Basic Agreement promising them relief from the costs of employee pass travel, their claim that they have lost a "discrete contractual right" is not credible.[16] Even if such a right did exist, it was certainly not a distinct and separable element of the arrangement they entered in 1971. As for quantifying the economic significance of abrogating such a right, the matter is far more complex than the Railroads suggest. They indicate that the impairment can be assessed "by merely examining the bills submitted by Amtrak to the Railroads pursuant to Sec. 405(f)." Railroads' Brief at 40. But the Railroads' loss must be offset against their gain: a valued fringe benefit for their employees, the existence of which eased labor tensions in the early 1970's, and for which the Railroads paid virtually nothing from 1972 to 1979. It is by no means clear that the Railroads suffered any net loss as a result of enactment of the 1972 and 1979 Amendments. If they did, and if a court could

[16] The Railroads' course of conduct from 1972 to 1979 indicates that they did not believe any contract impairment had occurred. Although they were required to pay hundreds of thousands of dollars for their employees' pass travel, under a statutory requirement which they now contend was plainly unconstitutional, they took no action whatsoever to challenge the requirement.



somehow quantify the loss, it would surely not be substantial.[17]

Having overstated their loss, the Railroads proceed to understate substantially the value of the release from passenger service obligations. The $82.8 million in start-up payments represent what they surrendered, not what they received. By paying those sums—one-half of one year's passenger service deficits—they avoided far greater losses in subsequent years.[18] The Railroads have been free of all passenger service losses for over thirteen years, and the losses they avoided far outstrip the amounts of the start-up payments. It is against this far larger measure of the value of the release that the magnitude of the alleged impairment must be judged. Again, if *any* net impairment did occur, taking into account benefit to the Railroads, it was plainly not a substantial impairment of the overall value of the release.

Amtrak noted in its initial brief that under the reasoning of the Court's decision in *City of El Paso v. Simmons*, 379 U.S. 497 (1965), subsequent legislative efforts to deal with unforeseen benefits in contractual relationships

[17] The Railroads attempt to question the importance of pass privileges to the railroads who employ the pass riders, suggesting that unique circumstances may have led the Penn Central and the Norfolk & Western to press Amtrak for continuation and expansion of pass travel. Railroads' Brief at 6 n.3, 39. But the record shows that "*the railroads*, and particularly Penn Central, had expressed the view that the withdrawal of free transportation privileges of employees threatened to produce severe problems *for the railroads* which, it was felt, would end by being harmful to Amtrak." J.A. 88 (emphasis added).

[18] Section 404 of the RPSA, 45 U.S.C. § 564, which was signed into law six months before the May 1, 1971 transfer date, stated that railroads that chose not to transfer service would be barred from discontinuing passenger service prior to January 1, 1975. Even after that date discontinuance could be effected only with the approval of the ICC. Thus it is reasonable to assume that at least four years' additional losses would have been incurred.

should not be deemed to cause substantial impairment. The Railroads attempt to dismiss this principle on the ground that the unintended benefits in the *El Paso* case arose from unforeseen economic conditions, whereas here they arise through a "purely volitional action by the State itself." Railroads' Brief at 38-39. But Congress did not create the statutory pass privilege in 1972 on a whim. Instead, it undertook what then appeared to be necessary regulation of interstate commerce, in order to preserve labor peace in the rail industry and to protect the legitimate interests of railroad employees.[19] It was employees' expectations engendered by the Railroads themselves, not simply the "volition" of Congress, that led to amendment of the statutory scheme to require Amtrak to provide pass privileges. Requiring the Railroads to pay reasonable amounts for those benefits does not constitute substantial impairment of the original bargain.[20]

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[19] Amtrak's Brief at 8-11. The legislative history of the 1972 Amendment, cited in Amtrak's Brief at 11, shows that Congress had in mind the same purpose that led to enactment of the Employment Retirement Income Security Act: ensuring that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he will actually receive it." *Pension Benefit Guaranty Corp. v. Gray & Co.*, 104 S.Ct. 2709, 2713 (1984), *quoting Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980). *See, e.g.*, 118 Cong. Rec. 14,790 (1972), where Senator Cooper stated in debates on the 1972 Amendment that railroad employees regarded lifetime passes upon retirement as "a part of their compensation, and a vested retirement benefit."

[20] In response to Amtrak's assertion that Congress could also take into account the dilution of Amtrak's revenues caused by creation of the pass privileges, Amtrak's Brief at 27 n.82, the Railroads argue that it is not reasonable to assume that substantial numbers of pass riders would choose to travel on Amtrak in the absence of free or reduced-rate privileges, since less than one percent of the traveling public opts to take Amtrak. Their statistical comparison is misleading, since railroad employees as a group are undoubtedly more favorably disposed to train travel than the public at large, and since pass riders are by definition persons who have already found train travel to be convenient and desirable. The real question to be



## IV. THE RAILROADS ERR IN ARGUING FOR REVIEW ACCORDING TO THE "NECESSITY" TEST OF *U.S. TRUST*.

The Railroads maintain that Congress has impaired its own contractual obligation and that the strict "necessity" standard of review applied in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), should therefore be applied to this case. They offer two reasons for invoking the "necessity" test: first, the government can function effectively only if it is held to its promises; and second, the government's self-interest is at stake when it impairs its own contractual obligations, so that it cannot be presumed to function in a disinterested manner. Railroads' Brief at 15-16.

Even if the Congress had failed to keep a promise in this case, there would still be no justification for applying the strict "necessity" test of *U.S. Trust*. The argument that strict review is warranted whenever the government stands to benefit from legislative action proves far too much. Strict review cannot be required every time there is a possibility of government benefit, for federal expenditures are almost always affected, directly or incidentally, when Congress enacts legislation.[21] Surely

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posed is, how many persons currently riding on trains under some pass privilege would be driven away if the discount were discontinued? Viewed in this light, the possibility of dilution acknowledged by GAO, J.A. 65, 68, is not as remote as the Railroads contend.

[21] The Court's recent decision in *Gray* confirms that the mere fact that legislation may serve the government's economic interest does not by itself justify the invocation of strict scrutiny. The legislation challenged and eventually upheld in *Gray*—the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381 *et seq.* (1982)—was passed for the express purpose of imposing retroactive financial obligations on private employers in order to diminish the likelihood that numerous private pension plans would terminate, thus forcing the Pension Benefit Guaranty Corporation—an entity wholly owned by the United States—to assume obligations in excess of its capacity. Although preexisting private

not all enactments with such an impact are valid only to the extent they are "necessary" to accomplish a legislative purpose.[22]

In fact, legislation is reviewed under a strict "necessity" test only when it impairs a limited category of government obligations—those that involve a clear contractual commitment by the government to repay money borrowed from private parties or to take other actions directly related to financial transactions. The Railroads implicitly concede the limited role of the stricter standard of review, for they seek to justify its invocation on the ground that "[p]unctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors." Railroads' Brief at 15, citing *Lynch v. United States*, 292 U.S. 571, 580 (1934).

The other authorities upon which the Railroads rely are, like *Lynch*, cases denying legislatures the power, absent some compelling purpose, to impair their own

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contractual arrangements were disrupted by enactment of the MPPAA, and although it was aimed at preserving the financial viability of a government corporation, the Court upheld the statute on the ground that Congress had acted rationally. The Court expressly declined to apply a stricter standard of review. 104 S.Ct. at 2719-20.

[22] The implications of employing the strict "necessity" test whenever the government's self-interest is at stake are staggering. In each such case the question would be asked, could Congress or a State legislature have accomplished its purpose by any other means? The Railroads' suggestion that Congress should have paid for employe pass privileges if it thought they were important, Railroads' Brief at 36, highlights the most obvious pitfall of the strict test: in many, if not most cases involving legislation that adjusts economic burdens, Congress could achieve its purpose by appropriating additional federal funds rather than requiring private parties to bear part of the burden. Congress' well-recognized discretion to adopt the most appropriate means to deal with economic or social problems would be seriously eroded under such a test. *See, e.g., Turner Elkhorn*, 428 U.S. at 15-19.



contracts where the government's credit has been pledged. *See Perry v. United States*, 294 U.S. 330, 351 (1935) (describing the government's pledge of its credit as "the highest assurance the government can give" and denying Congress the power "to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers"); *U.S. Trust*, 431 U.S. at 24-25 (stating that "States are bound by their debt contracts" and explaining that while not every security provision of a bond agreement is necessarily "financial," a commitment to safeguard the revenues securing bonds is indeed "financial" and thus binding on the State); *Energy Reserves Group, Inc.*, 459 U.S. at 412 n.14 ("In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets").[23]

The strict standard of review that is employed in these cases is clearly limited to situations involving governmental debt contracts or similar financial obligations.[24]

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[23] *See also Local Division 589*, 666 F.2d at 642 (emphasizing that "*United States Trust* limits its stricter 'review' approach to state laws in the 'financial' area," and stating that the facts of that case "presented a paradigm of the type of protection that the Contract Clause was designed to offer—a protection given to those who invested money, time and effort against loss of their investment through explicit repudiation").

The Railroads seek support for broad application of a strict standard from the commentators, but there too arguments for strict review are generally restricted to narrow circumstances easily distinguished from the ones in this case. Professor Tribe's view that absent compelling circumstances, "government must keep its word," Railroads' Brief at 16, is limited to situations where the government chooses "to signal its trustworthiness and thus to induce the sort of reliance that it could instead have spurned." L. Tribe, *American Constitutional Law* 470 (1978). In this case, the government has used language indicating regulatory relief rather than binding contractual obligation, and it has cautioned against reliance by expressly reserving its right to amend or repeal the RPSA.

[24] This approach is not in conflict the important principle that the government cannot bargain away essential attributes of its sover-

The Railroads seek to justify strict review here by suggesting that the release Congress gave them is "akin to a government financial obligation or tax exemption contract . . . ." Railroads' Brief at 21. But the analogy does not work.[25] The Congress has not struck a financial bar-

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eignty, for as the Court has noted with respect to State and city governments, "when they borrow money and contract to repay it with interest, they are not acting as sovereignties. They come down to the level of ordinary individuals." *U.S. Trust*, 431 U.S. at 25 n.23, *quoting Murray v. Charleston*, 96 U.S. 432, 445 (1877).

Another reason for treating government impairment of financial obligations differently is that when the government enters into a contract to borrow money and repay it at a prescribed rate, it has induced a private party to forego a broad range of other investment opportunities, based on the particular economics of the transaction and perhaps on the superior reliability of the government as well. The Railroads' release from passenger service obligations arose in an altogether different context. They were not choosing among alternative investments; instead, they were paying to be relieved of their common carrier obligation to operate passenger service.

[25] That the Railroads recognize the weakness in the analogy is demonstrated not just by the slight attention they pay this point, but also by their deliberate omission of language from the *Perry* decision showing the limited reach of that case. At page 14 of their brief, they include an extensive quote from *Perry* stating that there is

> a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of Congress to alter or repudiate the substance of its own engagements . . . To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise.

The language they have chosen to delete shows the limited scope of the *Perry* decision. The Court was speaking only of

> the power of Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers. In authorizing the Congress to borrow money, the Constitution empowers the Congress to fix the amount to be borrowed and the terms of payment. By virtue of the power to borrow money *"on the credit of the United States,"* the Congress is authorized to pledge that credit as an assurance of payment as stipulated, as the highest assurance the Government can give, its plighted faith.

294 U.S. at 351 (emphasis in original). *See also id.* at 353. When this omitted language is considered, the *Perry* decision is shown to be consistent with other authorities limiting strict enforcement of governmental commitments to financial contracts wholly different from the release at issue in this case.



gain with the Railroads or pledged its credit in any respect; it has simply offered them relief from valid and longstanding regulatory burdens placed on common carriers. The fact that Congress conditioned relief on the payment of money to enable Amtrak to commence operations does not convert the RPSA or the Basic Agreement into financial instruments. Here Congress is exercising its sovereign power as regulator, and does not confront the Railroads as a mere obligor. The Railroads can point to no judicial authority employing a strict "necessity" test in this non-financial context.[26]

The Railroads attempt to buttress their plea for strict scrutiny by alleging that Congress' self-interest is at work here in some unseemly way. Railroads' Brief at 30-31. Again, the record does not bear them out. The best explanation of the origin of the 1979 Amendment comes from its sponsor, Congressman Florio, who stated in hearings that it was "difficult to accept railroad employees riding for virtually free, . . . if, in fact, the taxpayers are paying $2 for every $1 of the general passenger public." J.A. 100. The goal, in other words, was to spread the costs of pass riders' transportation more equitably, so that these costs would no longer be

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[26] That strict review is not appropriate where the government impairs its own non-financial contracts is confirmed by the decision in *El Paso*, where the government itself was a party to the land contracts that were arguably impaired. *Cf. United States v. Porhownik*, 182 F.2d 829 (2d Cir.), *cert. denied*, 340 U.S. 825 (1950).

borne entirely by the general public, but would be funded in some more meaningful measure by the employing railroads. Both purposes—compelling the Railroads to pay a greater share, and reducing the need for federal support paid by all taxpayers—are legitimate legislative goals.[27]

In sum, the Railroads have not shown that the 1979 Amendment should be judged by any test more restrictive than the familiar means-ends test of rationality, nor have they cast any doubt on the reasonableness of Congress' action.

## CONCLUSION

For the reasons set forth above, the Court of Appeals' holding that the 1979 Amendment is unenforceable should be reversed.

Respectfully submitted,

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[27] The Railroads assume that reducing federal subsidies is not a proper concern, and they see it reflected in the language of Senate Report No. 96-183, stating that an early version of the 1979 reimbursement requirement "reflects revenue considerations rather than cost considerations." Railroads' Brief at 30. But they do not acknowledge that the provision referred to in this Report was *not* adopted and that it required compensation at a *50%* rate, not the 25% rate that was ultimately enacted. Congress reconsidered and lowered the rate; and two years later, following receipt of GAO's extensive analysis of cost and value considerations, it made the 25% formula permanent.